

REPORTS
OF THE
PUBLIC SERVICE COMMISSION
OF
THE STATE OF MISSOURI

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Morris Woodruff
Reporter of Opinions

JEFFERSON CITY, MISSOURI
(2017)

PREFACE

This volume of the *Reports of the Public Service Commission of the State of Missouri* contains selected Reports and Orders issued by this Commission during the period beginning January 3, 2013 through December 31, 2013. It is published pursuant to the provisions of Section 386.170, et seq., Revised Statutes of Missouri, 2016, as amended.

The syllabi or headnotes appended to the Reports and Orders are not a part of the findings and conclusions of the Commission, but are prepared for the purpose of facilitating reference to the opinions. In preparing the various syllabi for a particular case an effort has been made to include therein every point taken by the Commission essential to the decision.

The *Digest of Reports* found at the end of this volume has been prepared to assist in the finding of cases. Each of the syllabi found at the beginning of the cases has been catalogued under specific topics which in turn have been classified under more general topics. Case citations, including page numbers, follow each syllabi contained in the Digest.

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**REPORTS OF
THE PUBLIC SERVICE COMMISSION
OF THE
STATE OF MISSOURI**

The Staff of the Missouri Public Service Commission, Complainant, vs. Cintex Wireless, L.L.C., Respondent.

File No. RC-2012-0421

TELECOMMUNICATIONS. §14.1. Universal Service Fund. §27. Invasion of adjacent service area. On allegation of misleading regulatory authorities and advertising outside service territory, a revised stipulation and agreement addressed the Commission's concerns and was consistent with the public interest, so the Commission approved it.

ORDER REGARDING STIPULATION AND AGREEMENT

Issue Date: January 3, 2013

Effective Date: January 13, 2013

On June 14, 2012, the Commission's Staff filed a complaint against Cintex Wireless, L.L.C. Staff alleged that:

- 1.) Cintex intentionally marketed in areas without an Eligible Telecommunications Carrier ("ETC") designation, because some (9 out 100 checked) application forms were mailed to potential customers in exchanges where Cintex is not authorized to do business.
- 2.) Cintex engaged in misleading marketing, because its advertising could cause customers to infer that the Commission authorized Cintex to offer free phone service to them.
- 3.) Cintex made misstatements to regulators. Specifically that it misrepresented the number of its customers to the FCC, and it failed to disclose that Liberty Wireless and Movida (other cell phone companies) have a common interest with Cintex.
- 4.) Cintex has unsuitable leadership because of pending Securities and Exchange Commission ("SEC") allegations against its Chief Executive Officer ("CEO"). Those allegations claim the CEO was involved in a scheme to artificially inflate the earnings of a publicly-traded company for personal profit.

Cintex answered stating:

- 1.) Staff has alleged no violation of a Commission rule, statute, tariff provision or Commission order as required by Section 386.390 in order to prosecute a complaint.
- 2.) Cintex's vendor provided it with zip codes in error resulting in unintentional mailings to areas outside of its ETC designation. The problem was corrected once discovered, and no services are being provided to customers outside of its ETC designation. No Universal Service support will be provided for customers outside of its ETC designation area.

- 3.) Cintex did not engage in any misleading advertising. The language in its advertising explained all eligibility requirements. The advertisement was included with its ETC application, which the Commission approved.
- 4.) Cintex maintains it held multiple conference calls with Staff and corrected the misstatement regarding the number of its customers. Cintex also claims that Liberty Wireless and Movida are not corporate entities but are registered service marks with the US Patent and Trademark Office and are used as trade names for non-Lifeline customers. Cintex also claims that in discussions with Staff, Staff informed it that no further information was required by it.
- 5.) The pending SEC allegations against Cintex's CEO are unproven allegations and no adjudication has occurred rendering a decision on those allegations. The allegations are civil in nature and do not involve interactions with any government entity; the CEO denies the allegations. Cintex has extensive processes and procedures to prevent fraud, waste and abuse. (The SEC complaint was filed after the Commission granted Cintex ETC designation so Cintex could not disclose this to Staff at the time its ETC application was filed).
- 6.) Cintex further maintains that currently, it is offering only a free non-Lifeline service in Missouri at its sole expense.

An evidentiary hearing was set to be held on November 29 and 30, 2012. However, on September 21, 2012, the parties filed a Unanimous Stipulation and Agreement ("Agreement") purporting to resolve all issues in this matter. On November 15, 2012, the Commission convened an on-the-record proceeding to direct questions to the parties regarding the Agreement. At that proceeding the Commissioners expressed various concerns to the parties regarding specific provisions to the Agreement.¹ Consequently, the parties were directed to file a revised agreement addressing those concerns.

On December 6, 2012, the parties jointly filed a revised Unanimous Stipulation and Agreement (Revised Agreement) with an explanation of the revisions. After reviewing the Revised Agreement, the Commission finds that it adequately addresses its concerns.

This is a contested case² pursuant to Section 386.390, RSMo 2000, although the statutes and Commission regulations allow for a decision without a hearing.³ The Revised Agreement waives any procedural requirements that would otherwise be necessary before final decision.⁴ Also, because the settlement disposes of this action, the Commission need not separately state its findings of fact.⁵

¹ EFIS Docket Entry Number 35, Transcript, Volume 2. EFIS is the Commission's Electronic Information and Filing System.

² A "[c]ontested case" means a proceeding before an agency in which legal rights, duties or privileges of specific parties are required by law to be determined after hearing." Section 536.010.4, RSMo Cum. Supp. 2008.

³ Sections 536.060 and 536.063, RSMo 2000; Commission Rule 4 CSR 240-2.115.

⁴ Section 536.060, RSMo 2000.

⁵ Section 536.090, RSMo 2000.

Based on the Commission's independent and impartial review of the Revised Agreement, the Commission finds that it is consistent with the public interest and shall approve it. Therefore, the Commission incorporates the terms of the Revised Agreement into this order.

THE COMMISSION ORDERS THAT:

1. The provisions of the Unanimous Stipulation and Agreement filed on December 6, 2012 are approved and incorporated into this order as if fully set forth. The Signatories shall comply with the terms of the Unanimous Stipulation and Agreement. A copy of the Unanimous Stipulation and Agreement is attached to this order as Appendix A.
2. This order shall become effective on January 13, 2013.
3. This file shall be closed on January 14, 2013.

Gunn, Chm., Jarrett, Kenney, and
Stoll, CC., concur.

Stearley, Deputy Chief Regulatory Law Judge

NOTE: The Stipulation and Agreement in this case has not been published. If needed, this document is available in the official case files of the Public Service Commission.

In the Matter of the Application and Petition of Missouri-American Water Company Requesting the Commission Promulgate an Environmental Cost Adjustment Mechanism for the Water Industry

File No. WX-2013-0267

WATER

§18. Costs and expenses.

§30. Rules and regulations.

§18. Costs and expenses.

§30. Rules and regulations.

§18. Costs and expenses.

§30. Rules and regulations. A petition to initiate rulemaking asked the Commission to create an environmental cost adjustment mechanism for water companies, but the Commission had insufficient information to address the statutory standards for making a rule without further research, so the Commission denied the petition but began an investigation on the issues that such a rulemaking must address.

**ORDER DENYING PETITION FOR PROMULGATION OF A RULE TO ESTABLISH
AN ENVIRONMENTAL COST ADJUSTMENT MECHANISM FOR WATER
UTILITIES**

Issue Date: January 3, 2013

Effective Date: January 7, 2013

On November 9, 2012, Missouri-American Water Company filed a petition asking the Commission to promulgate a new rule to implement an environmental cost adjustment mechanism for water utilities. As required by Section 536.041, RSMo, the Commission provided a copy of that petition to the Joint Committee on Administrative Rules and to the Office of Administration. Before deciding whether to grant Missouri-American's petition, the Commission directed its Staff to investigate Missouri-American's petition and to file a recommendation. Staff filed that recommendation on December 14.

Staff agrees that Missouri-American has appropriately requested the implementation of an environmental cost adjustment mechanism. Staff does not take a position on the specific language of the rule proposed by Missouri-American but explains that the new rule will have an impact on many water utilities and customers throughout the state. For that reason, Staff recommends the Commission direct Staff to work with all interested stakeholders to draft an appropriate rule. To begin that process, Staff has scheduled workshop meetings for January 24, 2013 and February 28, 2013 to obtain input from those stakeholders.

Missouri-American filed a response to Staff's recommendation on December 20. In that response, Missouri-American indicates its willingness to participate in the workshop process proposed by Staff. However, it asks that the Commission act promptly to conclude the workshop process with the formal promulgation of a rule.

Section 536.041, RSMo (as amended in 2012), allows any person to petition a state agency requesting the adoption, amendment, or repeal of any rule. That section further requires the agency to submit a written response to the rulemaking petition within sixty days of receipt of the petition, indicating its determination of whether the proposed rule should be adopted. Similarly, Commission Rule 4 CSR 240-2.180(3)(B) requires the Commission to respond to a petition for rulemaking by either denying the petition in

writing, stating the reasons for its decision, or initiate a rulemaking in accordance with Chapter 536, RSMo.

Section 536.041 also requires the agency to offer a concise summary of the agency's "findings with respect to the criteria set forth in subsection 4 of section 536.175." The criteria in subsection 4 are designed to guide the agency's review of its existing rules under the periodic review process required by that statute. As a result, those criteria do not precisely match the review needed to determine whether Missouri-American's rulemaking petition should be granted. However, the gist of the criteria is to require the agency to consider whether the rule is properly drafted to be consistent with the language and intent of the authorizing statute; whether the rule imposes an unnecessary regulatory burden; and whether a less restrictive, more narrowly tailored, or alternative rule could accomplish the same purpose.

The Commission finds that it does not yet know the answer to those questions. For that reason, the Commission must at this time deny Missouri-American's petition. However, the workshop process proposed by Staff will allow all interested stakeholders an opportunity to present information and arguments to the Commission. In that way, those criteria can be satisfied if the Commission decides to undertake a formal rulemaking after the workshops.

To facilitate Staff's efforts to draft an appropriate rule, and to allow all interested stakeholders an opportunity to offer their advice concerning that rule, the Commission will issue a separate order to establish a working case to facilitate a series of workshops led by Staff and to contain the informal comments that may result from that workshop process. A separate working case is appropriate for that process to allow the informal comments presented in the workshops regarding initial drafts of the rule to be kept separate from the comments on the proposed rule that may be filed during the formal rulemaking process.

The Commission is mindful of Missouri-American's concern that the workshop process should not unreasonably delay the promulgation of a rule. Therefore, the Commission will direct its Staff to submit a proposed rule for the Commission's consideration no later than April 3, 2013.

THE COMMISSION ORDERS THAT:

1. Missouri-American Water Company's application and petition for promulgation of a rule relating to establishment of an environmental cost adjustment mechanism for the water industry is denied.
2. The Commission's Staff shall prepare and submit a proposed rule relating to establishment of an environmental cost adjustment mechanism for the water industry no later than April 3, 2013.
3. As required by Section 536.041, RSMo, a copy of this order shall be provided to the Joint Committee on Administrative Rules and to the Commissioner of Administration.
4. This order shall become effective on January 7, 2013.

Gunn, Chm., Jarrett, Kenney, and
Stoll, CC., concur.
Woodruff, Chief Regulatory Law Judge

In the Matter of Kansas City Power & Light Company's Request for Authority to Implement a General Rate Increase for Electric Service

File No. ER-2012-0174

EVIDENCE, PRACTICE AND PROCEDURE. §23. Notice and hearing. Intervenor did not show that the Commission's notice of a general rate action was inadequate.

§4. Presumption and burden of proof. §26. Burden of proof. §27. Finality and conclusiveness. A party seeking to abrogate a Commission order has the burden of proving that the order is unreasonable or unlawful "clear and satisfactory evidence," which is the equivalent of clear and convincing evidence.

§27. Finality and conclusiveness. On matters pending before an appellate court, inconsistent rulings generate confusion and uncertainty, while a reservation of ruling furthers administrative and judicial economy.

§5. Admissibility. A motion to strike constituted an objection to testimony untimely made, so the Commission denied it.

§30. Settlement procedures. When the Commission has no authority to order a provision of the parties' settlement, the Commission incorporates that provision into its order as a consent order.

ELECTRIC. §23. Return. Return on equity is not merely a matter of arithmetic, it is a multi-disciplinary exercise culminating in the application of the Commission's policy expertise, influenced by factors balancing or outweighing one another in permutations too numerous for any expert to fully catalogue and growing exponentially as experts compare each other's models.

§23. Return. Though succeeding to assets generally means succeeding to liabilities, the rescue of a distressed utility and preservation of service should not result in punitive action.

ACCOUNTING. §42. Accounting Authority Orders. Deferred recording requires no Commission order because Commission regulations, which adopt the Uniform System of Accounts, already authorize deferred recording of extraordinary expenses; deferred recording for future expenses—a "tracker"—seeks to characterize an expense as extraordinary before it has occurred, a pre-judgment that the Uniform System of Accounts does not provide, so some other authority is necessary.

REPORT AND ORDER

Issue Date: January 9, 2013

Effective Date: January 9, 2013

The Missouri Public Service Commission is rejecting the pending tariff sheets and ordering Kansas City Power & Light Company ("KCPL") and KCP&L Greater Missouri Operations Company ("GMO") (together, "Applicants") to file new tariff sheets in compliance with this order.

The Commission is authorizing return on equity as follows:

<i>Applicant</i>	<i>%</i>
KCPL	9.70
GMO	9.70

The Commission estimates that Applicants are authorized to increase the revenue they collect from Missouri customers by approximately the following amounts.¹

<i>Area</i>	<i>Amount</i>
KCPL	
All	\$64 million
GMO	
MPS area	\$28 million
L&P area	\$21 million

¹ This number is only an estimate of the overall impact of the decisions described in this report and order and does not constitute a ruling.

That estimate is based on the data contained in the updated reconciliations filed by the Commission's staff ("Staff") on January 8, 2013.

This report and order also addresses the settlement provisions incorporated into the Commission's orders. As to those matters as to which some parties agree and no parties oppose, but that are outside the Commission's subject matter jurisdiction to order, this report and order constitutes a consent order.

The Commission does not specifically discuss matters that are not dispositive. The Commission makes each ruling on consideration of each party's allegations and arguments, and has considered the substantial and competent evidence on the whole record. Where the evidence conflicts, the Commission must determine which is most credible and may do so implicitly.² The Commission's findings reflect its determinations of credibility and no law requires the Commission to make any statement as to what portions of the record the Commission accepted or rejected.³

On those grounds, the Commission independently makes its findings of fact, reports its conclusions of law,⁴ and orders relief as follows.

I. Jurisdiction

The statutes give the Commission jurisdiction to determine Applicants' terms, and amounts charged, for electrical service.

Findings of Fact

1. Each applicant is a subsidiary of Great Plains Energy, Incorporated ("GPE"). GPE is a publicly traded corporation. GPE wholly owns both Applicants, neither of which is a publicly traded corporation. KCPL is a Missouri corporation. GMO is a Delaware corporation authorized to do business in Missouri. GMO is staffed with KCPL and GPE employees.

2. Applicants sell electricity at wholesale and retail. Applicant's service territories are in the central and northern parts of the western side of Missouri. GMO's service territory consists of two districts, one called MPS, and the other called L&P.

3. Applicants' customers consist of approximately the following.

<i>KCPL</i>	<i>Classification</i>	<i>GMO</i>
451,000	Residential	274,000
58,000	Commercial	38,000
2,100	Industrial, municipal, and other electric utilities	500
511,000	<i>Total</i>	312,000

Applicants each have their own generating capacity, but also buy power to serve their respective customers, GMO more than KCPL.

² *Stone v. Missouri Dept. of Health & Senior Services*, 350 S.W.3d 14, 26 (Mo. banc 2011).

³ *Stith v. Lakin*, 129 S.W.3d 912, 919 (Mo. App., S.D. 2004).

⁴ Section 386.420.2, RSMo 2000.

Discussion, Conclusions of Law, and Ruling

The Commission's jurisdiction generally includes every public utility corporation,⁵ which includes electrical companies.⁶ Electrical companies include the Applicants because Applicants provide electrical service to Missouri customers.⁷ Regulating the Applicants' service and rates is specifically within the Commission's jurisdiction through the use of tariffs.⁸ The filing of tariffs began this action. Therefore, the Commission concludes that it has jurisdiction to rule on the tariffs and determine Applicants' terms of and charges for service.

II. Procedural Background

On February 27, 2012, KCPL and GMO filed the pending tariffs seeking revenue increases approximately as follows:

<i>Area</i>	<i>Amount</i>	<i>Percentage</i>	<i>Per Day for a Typical Residential Customer</i>
KCPL			
All	\$105.7 million	15.10%	\$0.48
GMO			
MPS area	\$58.3 million	10.90%	\$0.27
L&P area	\$25.2 million	14.60%	\$0.36
GMO total	\$83.5 million	11.76%	

The tariffs bear an effective date of March 28, 2012. By order dated February 28, 2012, the Commission suspended the tariff until January 26, 2013, the maximum time allowed by statute.⁹

The suspension of the tariffs initiated a contested case.¹⁰ In the same order, the Commission set a deadline for filing applications to intervene. Movants for intervention cited varying interests in this action, including status as a supplier, industrial customer, advocacy group, seller of a competing commodity. The Commission granted applications to intervene as set forth in Appendix A, paragraph iii. Some of the intervenors are unincorporated associations of legal entities. On October 16, 2012, the Natural Resources Defense Council withdrew.

⁵ Section 386.250(5), RSMo 2000.

⁶ Section 386.020(15) and (43), RSMo Supp. 2012; and Sections 393.140(1).

⁷ Section 386.020(20), RSMo Supp. 2012.

⁸ Sections 393.140(11), 393.150, and 393.290, RSMo 2000.

⁹ Section 393.150, RSMo 2000.

¹⁰ Section 393.150.1, RSMo 2000; and Section 536.010(4), RSMo Supp. 2012.

Intervenor Missouri Electrical Users Association-KC (“MEUA-KC”), an association of industrial customers, charges that the Commission’s notice to the public was inadequate because it did not specifically refer to one of the proposals raised by another intervenor. In the order dated February 28, 2012, the Commission directed that notice of this action be provided to the county commission of each county within applicants’ service area, and made notice available to the members of the General Assembly representing applicants’ service area, and to the news media serving applicants’ service area.¹¹ Further, the Commission ordered individual notice of local public hearings in this action to every customer of Applicants.¹² MEUA-KC cites no authority showing that the Commission’s notice was insufficient.

By order dated April 19, 2012, the Commission established the periods relevant to the tariffs:

- a. Test year to determine how much the Applicants need to provide safe and adequate service at just and reasonable rates: 12 months ending September 31, 2011;
- b. Update for known and measurable changes to amounts drawn from the test year: through March 31, 2012; and
- c. True-up for other significant items relevant to rates: through August 31, 2012.

The Commission also consolidated File No. ER-2012-0174 with File No. EU-2012-0130,¹³ in which KCPL sought an order authorizing deferred recording of certain amounts (“accounting authority order”).

The Commission convened local public hearings in Applicants’ service territories as follows.¹⁴

September 6	Nevada
	Sedalia
September 12	St. Joseph
	Riverside
September 13	Kansas City
	Lee’s Summit

¹¹ *Order Suspending Tariff, Setting Pre-Hearing Conference, and Directing Filings; and Notice of Contested Case and Hearings*, issued Feb. 28, 2012, page 3.

¹² *Order Setting Local Public Hearings and Prescribing Notices*, issued June 5, 2012.

¹³ *Order Granting Motion to Consolidate*, issued April 3, 2012.

¹⁴ All cities in are Missouri and all dates are in 2012.

Staff filed a list of issues on October 11, 2012, and the parties filed position statements, the last on October 15, 2012.¹⁵ On December 21, 2012, GMO filed an application, with a request for expedited treatment, for a waiver or variance from the Commission's regulation on the costs of complying with renewable energy standards.¹⁶ GMO also filed the same document in File No. ER-2013-0341. In the interest of administrative efficiency, and to avoid duplication of effort and potential inconsistencies, the Commission has addressed the matter under File No. ER-2013-0341.

On December 24, 2012, Staff and KCPL filed notice of a new issue:¹⁷ which demand-side programs a customer may opt out of under the Missouri Energy Efficiency Investment Act ("MEEIA").¹⁸ Staff recommends that the Commission not address the new issue because it is too late to develop evidence and arguments. Staff is correct and the Commission will not address that matter in these actions.

On December 17, 2012, Midwest Energy Consumers Group ("MECG"), an association of large-scale purchasers, filed a motion to update its reply brief with additional authorities.¹⁹ Applicants filed a response to that motion with additional authorities of their own on December 20, 2012.²⁰ Applicants filed further additional authorities on December 26, 2012.²¹ The Commission will grant the motions and consider the additional authorities.

Three motions to strike remain pending. The Office of the Public Counsel ("OPC") raised the latest motion to strike in its post hearing brief. The Commission denies that motion as an untimely objection to testimony. MECG filed the first motion to strike²² and the second motion to strike,²³ Staff joining in the latter. The first and second motions to strike addressed KCPL's proposed tariffs and supporting testimony for an interim energy charge ("IEC"). The Commission will deny the first and second motions to strike as moot because the IEC claim is among the issues that the parties have settled.

¹⁵ An issues list and position statements function like pleadings. The issues list is a document that Staff assembles in coordination with the other parties, setting forth each matter on which any party seeks the Commission's ruling. A position statement sets forth the ruling that a party wants on an issue. Most parties take a position on less than all issues. For example, the interests of most intervenors are limited to their commercial or public policy purposes. An issues list and position statements appear late in a general rate action because not until then do the parties know which, of the countless items in the tariffs for a utility the size of Applicants, are at issue.

¹⁶ *Application for Waiver or Variance of 4 CSR 240-20.100(6)(A) for St. Joseph Landfill Gas Facility and Motion for Expedited Treatment*, filed on December 21, 2012.

¹⁷ *Joint Notice of Dispute Between Staff and [KCPL] Regarding Customer Opt Out of Demand-Side Management Programs and Associated Programs' Costs*, filed by Staff and KCPL on December 24, 2012.

¹⁸ Section 393.1075, RSMo Supp. 2012.

¹⁹ *Motion to Update Reply Brief*, filed on December 17, 2012.

²⁰ *Response to MECG Motion to Update Reply Brief and Motion to Provide Supplemental Authorities*, filed on December 20, 2012.

²¹ *Additional Orders in Support of Motion to Provide Supplemental Authorities*, filed on December 26, 2012.

²² *Motion to Strike Pre-Filed Testimony and Reject Tariffs and Motion for Expedited Treatment*, filed on May 25.

²³ On July 6, 2012.

III. Settlements

A contested case allows for waiver of procedural formalities²⁴ and a decision without a hearing,²⁵ including by settlement.²⁶ The parties filed stipulations and agreements as follows.

ER-2012-0174 and ER-2012-0175			
<i>Partial Nonunanimous Stipulation and Agreement Respecting Kansas City Water Services Department and Airport Issues</i>		October 19 ²⁷	
<i>Non-Unanimous Stipulation and Agreement as to Certain Issues</i>		October 19	
<i>Non-Unanimous Stipulation and Agreement Regarding Low-Income Weatherization and Withdrawal of Objection and Request for Hearing</i>		October 26	
<i>Non-Unanimous Stipulation and Agreement Regarding Praxair, Inc., Ag Processing Inc a Cooperative and the Midwest Energy Users' Association's Objection and Withdrawal of Objection and Request for Hearing</i>		October 29	
ER-2012-0174		ER-2012-0175	
<i>Non-Unanimous Stipulation and Agreement Regarding Class Cost of Service / Rate Design</i>	October 29	<i>Non-Unanimous Stipulation and Agreement Regarding Class Cost of Service / Rate Design</i>	October 29
<i>Second Non-Unanimous Stipulation and Agreement as to Certain Issues</i>	November 8	<i>Second Non-Unanimous Stipulation and Agreement as to Certain Issues</i>	November 8

Also, in File No. ER-2012-0175, Staff filed its Exhibit No. 392,²⁸ which is the stipulation and agreement in File No. EO-2012-0009. That action addressed issues under the Missouri Energy Efficiency Investment Act ("MEEIA") and the settlement resolves all MEEIA issues. Of those stipulations and agreements, only the *Non-Unanimous Stipulation and Agreement Regarding Class Cost of Service / Rate Design* in File No. ER-2012-0174, remains opposed and so constitutes the signatories' position statement on an issue to be tried.²⁹ All other stipulations and agreements ("settlements") are unopposed, so the Commission will treat the settlements as unanimous.³⁰

²⁴ Sections 536.060(3) and 536.063(3), RSMo 2000.

²⁵ Sections 536.060, RSMo 2000.

²⁶ *Id.* and 4 CSR 240-2.115.

²⁷ All dates in this chart are in 2012.

²⁸ *Nonunanimous Stipulation and Agreement Resolving [GMO]'s MEEIA Filing*, filed on October 29, 2012.

²⁹ 4 CSR 240-2.115(2)(D).

³⁰ 4 CSR 240-2.115(2)(C).

The settlements address the accounting authority order application that was the subject of File No. EU-2012-0130, consolidated into ER-2012-0174, and other claims and defenses in File Nos. ER-2012-0174 and ER-2012-0175. On the matters disposed of by settlement, no party seeks an evidentiary hearing, so no hearing is required,³¹ and the Commission need not separately state its findings of fact.³² Nevertheless, applicants have the burden of proving that increased rates are just and reasonable.³³ Except as otherwise provided by statute, the preponderance of the evidence,³⁴ and reasonable inferences from the evidence,³⁵ guide each determination.

The Commission's review of the record shows that substantial and competent evidence weighs in favor of the settlements' provisions as follows.

A. Standard for Service

The standard for service is that Applicants must provide "service instrumentalities and facilities as shall be safe and adequate [³⁶]" Upon review of the record and the settlement, the Commission independently finds and concludes that the settlement's proposed terms support safe and adequate service. Without further discussion, the Commission incorporates such terms, as if fully set forth, into this report and order.

B. Standard for Rates

The standard for rates is "just and reasonable,"³⁷ a standard founded on constitutional provisions, as the United States Supreme Court has explained.³⁸ But the Commission must also consider the customers.³⁹ Balancing the interests of investor and consumer is not reducible to a single formula,⁴⁰ and making pragmatic adjustments is part of the Commission's duty.⁴¹ Thus, the law requires a just and reasonable end, but does not specify a means.⁴² The Commission is charged with approving rate schedules that are as "just and reasonable" to consumers as they are to the utility.⁴³

³¹ *State ex rel. Rex Deffenderfer Ent., Inc. v. Public Serv. Comm'n*, 776 S.W.2d 494, 496 (Mo. App., W.D. 1989).

³² Section 536.090, RSMo 2000.

³³ Section 393.150.2, RSMo 2000.

³⁴ *State Board of Nursing v. Berry*, 32 S.W.3d 638, 641 (Mo. App., W.D. 2000).

³⁵ *Farnham v. Boone*, 431 S.W.2d 154 (Mo. 1968).

³⁶ Section 393.130.1, RSMo Supp. 2012.

³⁷ *Id.* and Section 393.150.2, RSMo 2000.

³⁸ *Bluefield Water Works & Improvement Co. v. Public Serv. Comm'n of the State of West Virginia*, 262 U.S. 679, 690 (1923).

³⁹ *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944).

⁴⁰ *Id.* at 586 (1942).

⁴¹ *Bluefield*, 262 U.S. at 692; *State ex rel. Associated Natural Gas Co. v. Public. Serv. Comm'n*, 706 S.W.2d 870, 873 (Mo. App., W.D. 1985) (citing *Hope Natural Gas Co.*, 320 U.S. at 602-03).

⁴² *Id.*

⁴³ *Valley Sewage Co. v. Public Service Commission*, 515 S.W.2d 845, 851 (Mo. App., K.C. D. 1974).

Determining whether an increase is necessary requires comparing the companies' current net income to the companies' revenue requirement. Revenue requirement is the amount of money necessary for providing safe and effective service at a profit. Those needs are tangible and intangible.⁴⁴ The Commission determines the revenue requirement from a conventional analysis of the resources devoted to service.

To provide service, a utility devotes its resources, which accounting conventions classify as either investment or expense as follows.

- Investment is the capital basis devoted to public utility service ("rate base") on which the utility seeks profit ("return" on investment).
 - Return is therefore a percentage ("rate of return") of rate base.
 - Rate base equals capital assets ("gross plant"), minus historic deterioration of such assets ("accumulated depreciation"), plus other items.
- Expenses include operating costs, replacement of capital items as they depreciate ("current depreciation"), and taxes on the return.

Those components relate to each other in the following formula:

- Revenue Requirement = Expenses + (Return x Rate Base)
- Rate Base = Gross Plant – Accumulated Depreciation + Other Items
- Expenses = Operating Costs + Current Depreciation + Taxes

The rate of return depends on the cost of each component in the utility's capital structure.

But determining the revenue requirement is not the entire analysis. The utility collects its revenue from its customers, who are not all the same, and so need not—and sometimes should not—receive the same treatment. The treatment afforded among the various classes of customers is rate design. Rate design should reflect the costs attributable to serving each class of customer respectively.

Accordingly, just and reasonable rates may account for such differences among customers.

C. Conclusion as to Matters Settled

Under those standards of law and policy, the Commission has compared the evidence on the whole record with the settlements. The Commission independently finds and concludes that the terms proposed in the settlement support safe and adequate service at just and reasonable rates. Therefore, the Commission will incorporate the settlements' provisions into this report and order, either as the Commission's rulings or, for those matters to which the parties agreed but the Commission has no authority to order, as the Commission's consent order.⁴⁵

⁴⁴ *Hope Natural Gas Co.*, 320 U.S. at 603 (1944).

⁴⁵ Section 536.060, RSMo 2000.

IV. Matters not Addressed in Settlements

The *Non-Unanimous Stipulation and Agreement Regarding Class Cost of Service / Rate Design* in File No. ER-2012-0174 remains subject to opposition from OPC, AARP, and Consumers Council of Missouri, Inc. and so constitutes the position statement of the signatories.⁴⁶

The Commission consolidated the actions in File Nos. ER-2012-0174 and ER-2012-0175 for hearing on the remaining disputes regarding the test year, updates, and related matters.⁴⁷ The Commission set the evidentiary hearing for October 17, 19, 22, 23, 24, 25, 26, 29, and 30, 2012. The parties stipulated to the admission of certain exhibits without objection and all such exhibits are admitted into the record. The parties filed initial briefs and reply briefs as set forth in Appendix B.

Bearing in mind the standards of law and policy set forth above, the Commission makes conclusions of law on the matters not disposed of in the settlements, with separately stated findings of fact on those remaining in dispute, as follows.

A. KCPL and GMO

The following matters are common to both KCPL and GMO.

i. Policy Matters

AARP and Consumers Council of Missouri, Inc. ("CCoMo")—entities that advocate for residential customers—Staff, and OPC ask the Commission to put their dispute in perspective as follows.

Findings of Fact

1. Missouri's economy suffered more and is recovering more slowly than the rest of the nation's economy, expressed as gross domestic product, with 100 as the start of the downturn, as follows.

<i>GDP</i>	<i>Nation</i>	<i>State</i>
Lowest point	95.3	91.9
June 2012	101.2	94.4

Adjusted for inflation ("real GDP"), in 2011, the nation grew by 1.5% and Missouri grew by 0.04%

2. In 2010, the unemployment rate in the KCPL service area reached 9.8%. In 2011, all the counties that GMO serves had higher unemployment rates than in pre-recession 2007.

⁴⁶ 4 CSR 240-2.115(2)(D).

⁴⁷ Knowing that the GPE subsidiaries would be the subject of overlapping evidence, the Commission made one record on both actions. That is why all exhibits appear under each file number in the Commission's electronic filing and information service (also called "EFIS"). Staff states that the actions "were consolidated for hearing but not for evidentiary purposes." *Staff's Reply Brief*, page 24. Because the hearing was an evidentiary hearing, Staff's statement is not well-taken.

3. Between 2007 and 2011, the Consumer Price Index (“CPI”) increased 11.58%. During that same time period, Applicants’ customers have experienced the following increases in electric rates and weekly wages (expressed as percentages).

	Average Weekly Wages	Electric Rates
KCPL		
	11.45	43.80
GMO		
MPS	11.80	32.13
L&P	14.72	46.14

Discussion

The parties offering these matters do so as a factor affecting other matters in these actions, but seek no conclusions of law or ruling on them, so the Commission will make none.

ii. Return on Equity

The Commission is setting Applicants’ return on common equity, also called return on equity, (“RoE”) at 9.7%. Because RoE is so important in determining Applicants’ rates, the Commission sets forth its determination on RoE first. That primacy in this report and order does not reflect an absence of other considerations, like capital structure, that influence RoE. Many are the issues affecting an appropriate RoE:

Determining a rate of return on equity, however, is imprecise and involves balancing a utility’s need to compensate investors against its need to keep prices low for consumers. [⁴⁸]

The Commission’s determination stands on evidence for which the foundation is unchallenged, and objections therefore waived, including the qualifications of any witness to offer an opinion as an expert.⁴⁹ As to each expert’s testimony, the Commission may believe all, part, or none.⁵⁰ The most convincing evidence and argument is reflected in the Commission’s findings of fact, as follows.

Findings of Fact

1. Return on equity (“RoE”) influences the amount that a stock issuer pays to an investor, so it is a major factor in how much an investor is willing to pay for the stock. Applicants do not issue their own equity and debt. GPE issues debt and equity in Applicants’ names.

2. To simulate an RoE for Applicants requires economic modeling. An accurate model requires accurate data, which means recent measures of comparable companies’ earnings potentials and risks.

⁴⁸ *State ex rel. Pub. Counsel v. Pub. Serv. Comm’n*, 274 S.W.3d 569, 573-74 (Mo. App., W.D. 2009) (citations omitted).

⁴⁹ *Proffer v. Fed. Mogul Corp.*, 341 S.W.3d 184, 187 (Mo. App., S.D. 2011).

⁵⁰ *State ex rel. Office of Pub. Counsel v. Pub. Serv. Comm’n*, 367 S.W.3d 91, 103 (Mo. App., S.D. 2012).

3. The three most commonly used economic models for simulating RoE are Risk Premium, Capital Asset Pricing Model (“CAPM”) and Discounted Cash Flow (“DCF”).

4. Risk Premium considers that debt is less risky than equity, so stock issuers must offer a premium to attract investors over bonds. Generally, the risk premium is the difference between cost of debt and return on equity. But return on equity is less subject to market forces for a regulated utility as it is for other businesses.

5. CAPM focuses on the degree of risk that distinguishes one investment from another. CAPM multiplies degree of risk (from standard references) times the risk premium (calculated as the difference between stock and a risk-free investment like a United States Treasury bond) and adds the risk-free rate to determine RoE.

6. DCF models posit that a stock’s price equals the cumulative present value of the dividends per share that the stock will pay out for the indefinite future, discounted for a present value. The discount rate is the investors’ cost of equity for that stock, which is the competitive market return that investors find acceptable to hold or purchase that stock. It can be calculated as the stock’s current dividend yield (as directly and precisely observed) plus the long term dividend growth rate (which must be estimated). Normally, this growth rate is assumed for simplicity to be constant, but in some applications it is assumed to change over time (e.g., the two-stage DCF).

7. The DCF formula focuses on current stock prices and dividends, consequent current dividend yields, and predicted growth rates as follows:

$$RoE = \frac{\text{current dividend}}{\text{stock price}} \times \frac{(1 + \text{long-term dividend growth rate})}{2} + \text{long term dividend growth rate}$$

For those factors, current conditions are as follows.

<i>Factor</i>	<i>Conditions</i>
current stock dividends and prices	prices higher than dividends
predicted growth rates	Low
consequent current dividend yields	Lower

8. The best DCF analysis includes long-run investor expectations calculated by “sustainable” or earnings retention growth rates. Alternatives include published analyst earnings projections and historical trends. But projections may be overstated and are not necessarily reliable; and the most recent historical trend data is less useful than in the past due to recent economic disruptions.

9. From 2001 through 2012, capital costs have generally declined. Early in that period, utility bond yields averaged about 8% and 10-year Treasury yields about 5%. By 2011, those bond and Treasury yields had declined to 5.1% and 2.8%, respectively. In 2012, yields declined even further, to near or below the lowest levels in decades.

10. The reasons are several. The U.S. Treasury and the Federal Reserve Board bought U.S. government debt, which deflates interest rates. Other factors pushing interest rates down include low inflation rates and slow economic growth. None of those phenomena will end any time soon. That trend manifests in low inflation rates, and low ten-year Treasury yields, 3-month Treasury bill yields, and Moody’s Single A yields on long-term utility bonds.

11. These disruptions also make Risk Premium and CAPM useful only as a check on the results from DCF analysis. The results from DCF analysis decrease when investor expectations decrease, which happens when interest rates decrease. Therefore, as a result of current economic conditions, RoE awards have trended lower, as shown by the national averages of other state commissions' awards:

<i>Period</i>	<i>Average</i>
2011	10.22
2012 first quarter	10.84
2012 second quarter	9.92
2012 third quarter	9.78
2012 first nine months	9.97

12. For future economic growth under DCF analysis, the best measure is gross domestic product ("GDP") plus inflation ("nominal GDP"). The best projections of nominal GDPs are:

<i>Year</i>	<i>Percent</i>
2012	3.9%
2013	4.1%
2014-15	5.1%
2018-23	4.7%

13. Currently, and for the foreseeable future, utility equity investors are accepting yields considerably lower than they have in the past. Nevertheless, returns on electric utility stocks are relatively stable and Applicant's business risk has not increased since the Commission set Applicants' RoE at 10.0% on April 27, 2011. GPE's relatively strong capital structure supports a lower RoE for Applicants.

14. An RoE of 9.7 is enough for both KCPL and GMO to continue operating and to attract investment.

Conclusions of Law

Applicants have not carried their burden of proving that their RoE should be in the range they propose and, of all parties' evidence and argument, the single most persuasive is that of the federal executive agencies ("FEAs"), entities within the United States' government that are customers of Applicants.

The parties sponsored witnesses testifying to RoE ranges and recommendations as follows.

<i>Sponsor</i>	<i>Range</i>	<i>Recommendation</i>
Staff	8.00 to 9.00	9.00
OPC	9.10 to 9.50	9.40
FEAs	8.80 to 9.80	9.50
Applicants	9.80 to 10.30	10.30

Of the ranges supported by expert testimony, the authorized RoE is:

- within the FEAs',
- between OPC's and Applicants', and
- outside Staff's,

as follows.

FEAs 8.80 to 9.80					
Staff 8.00 to 9.00		OPC 9.10 to 9.50		Authorized 9.70	Applicants 9.80 to 10.30

The Commission will discuss the parties' cases in the following order:

- The FEAs first because their case is the most persuasive,
- Applicants and OPC next because their experts' analyses bracket the authorized RoE, and
- Staff last because its expert's range is the outlier.

FEAs. The FEAs suggest a range of 8.8% to 9.8%, which includes the authorized RoE of 9.7%. The Commission finds their analysis the most persuasive for several reasons. The FEAs' expert used the Applicants' first proxy group⁵¹ and so begins his analysis on the same footing. For growth projections, the FEAs' expert employed multiple sources of published projections, but did not rely on these alone, resulting in a more thoroughly researched result. The FEAs' expert also generously considered potential future earnings growth contribution from issuance of new common stock at prices above book value.

Applicants. Applicants suggest a range of 9.80% to 10.30%. In support of that range, Applicants offer several standard analyses, and one non-standard analysis, but all the results are exaggerated because of the values that Applicants use in the formulas.

Applicants' proxy group changed between the filing of their direct testimony and rebuttal testimony. The second group omitted three of the companies with the lowest RoE, while retaining the three companies with the highest RoE, and adding companies with higher-than-average RoEs. Inevitably, that raises the resulting RoE.

Also troubling is the DCF Terminal Value model that Applicants offer. DCF analyses look at long-term events but DCF Terminal Value looks at just four years. It is a new approach to DCF and is not in general use. Also, the proffered analysis is flawed. The DCF Terminal Value analysis stands on the premise that current low interest rates make debt less attractive to investors, who therefore invest in stocks at prices higher than usual. The analysis assumes that investors will pay a price-to-earnings ("P:E") ratio of 16:1 through 2016. But the analysis also claims that interest rates will soon rise, which will send investors back to debt instruments and away from stocks, undercutting the 16:1 P:E ratio on which the analysis relies.

⁵¹ Applicants' RoE witness changed his proxy group over the course of litigation, skewing his results, as described more fully below.

Further, all Applicants' DCF analysis share certain flaws. They use a 5.7% GDP projected from 1971-1980 data, which is not helpful compared to the 30 most recent lower growth years, and does not reflect investor expectations. Nor does that rate account for events likely to shape GDP in the future. Given the economic conditions currently prevailing, it is not credible that investors today use a 5.7% GDP to assess their expectations for low-risk investments.

Moreover, Applicants' attempt to adjust for the economic intervention of the U.S. Treasury and the Federal Reserve Board that is lowering interest rates undercuts the DCF model itself. To an investor, a decrease in return figures into the price investors will pay for an investment only because it is a decrease, and the reason for the decrease is irrelevant whatever the cause. The markets are not wrong—RoE cannot increase when risk has not increased and capital costs have decreased.

Thus, Applicants' DCF analyses (other than Terminal Value) are sound but the variables employed exaggerate the results. Therefore, the Commission rejects Applicant's suggested range of RoEs. Nevertheless, the Commission notes that Applicants' second proxy group has a median RoE of 9.8 percent, which is just above the authorized RoE of 9.7%.

OPC. Just below the authorized RoE is the analysis of OPC's witness. OPC's witness offers a range of 9.1% to 9.5%, based on investor expectations of both short-term growth and long-term sustainable growth, therefore employing multi-stage DCF analysis, which thus constitutes a thorough consideration. The Commission finds the analyses slightly too cautious, resulting in results too modest, so the Commission rejects it. Nevertheless, the Commission notes that, accounting more fully for the inverse relationship between risk premiums and interest rates OPC's expert analysis results in a range that includes the authorized RoE of 9.7%.

Staff. Staff suggested one range at hearing and another in briefing, but neither is entirely persuasive for the following reasons.

At hearing, Staff offered a range of 8.00% to 9.00%. In support of that range, Staff offers data from the period between 1968 and 1999. After that period, Staff alleges, industry disruptions make data unreliable, and an earlier period analogous to recent years more useful. Those arguments do not persuade the Commission that data from a remote period starting 44 years ago is more reliable for determining recent RoE than more recent data. Therefore, the Commission rejects the 8.00% to 9.00% range.

In briefing, Staff argues for an expanded range of 8.00% to 9.78%. The new upper end comes from a variety of sources including the downward trend in national averages of other state commissions' RoE awards as the Commission has found:

<i>Period</i>	<i>Average</i>
2011	10.22
2012 first quarter	10.84
2012 second quarter	9.92
2012 third quarter	9.78

Those numbers are relevant, not because any other RoE ruling on different facts and different law helps calculate Applicants' RoE, but because Applicants must be able to attract capital. An RoE set too low will, as discussed above, unlawfully handicap Applicants when they compete for capital in the national marketplace.

Staff cites the 2012 third quarter amount—9.78%—for the high end of its expanded range. But the lower end of the expanded range comes from the discredited data discussed in the preceding paragraph. For that reason, the Commission does not entirely embrace the expanded range for RoE.

Nevertheless, the Commission notes that the authorized RoE is well within the upper end of Staff's expanded range.

Zone of Reasonableness. The national marketplace is also among the factors that help the Commission establish a zone of reasonableness for Applicants' RoE.⁵² Based on the downward trend in national averages of other state commissions' RoE awards, the continuing downward pressure on interest rates nationally, the slower-than-average recovery in Missouri, and the copious testimony of the many experts, the Commission has found a reasonable opportunity for Applicants to earn a reasonable return on their investment exists at 9.7%.

The Commission's Ruling. In proposing an RoE for Applicants, all experts agree that setting an RoE is not merely a matter of arithmetic. RoE is a multi-disciplinary exercise culminating in the application of the Commission's policy expertise. The factors influencing an RoE are legion, balancing or outweighing one another in permutations too numerous for any expert to fully catalogue, and growing exponentially as experts compare each others' models.

Among those myriad factors, the testimony indicates that a lower RoE may be appropriate for a utility that has an FAC like GMO than for a utility that does not have an FAC like KCPL, all things being equal. But no witness quantifies a difference between the Applicants, which implies that all things are not equal, and that other factors outweigh the distinction of the FAC, and support the same RoE for KCPL as for GMO: 9.7%.

An RoE of 9.7% lies within the zone of reasonableness as determined by the courts of Missouri and the United States. It will also allow Applicants to compete in the market for capital that they need to maintain their financial health, without raising rates unnecessarily. Therefore, the Commission concludes that an RoE of 9.7% for each of the Applicants will best support safe and adequate service at just and reasonable rates, and the Commission will order that RoE.

ii. Capital Structure

The Commission is ordering a capital structure reflecting GPE's actual capital Structure for each Applicant.

Findings of Fact

1. As of August 31, 2012, GPE's capital structure is 46.84 % debt to 53.16% equity (52.56% common and 0.60% preferred).

⁵² *State ex rel. Pub. Counsel v. Pub. Serv. Comm'n*, 274 S.W.3d 569, 574 (Mo. App., W.D. 2009), citing *In re Permian Basin Area Rate Cases*, 390 U.S. 747 (1968).

2. Ordinarily, capital structure excludes short-term debt and includes long-term debt. GPE is re-financing long-term debt with short-term debt. The short-term debt excluded from GPE's capital structure is thus a temporary substitute for long-term debt. This makes the capital structure more equity-rich, which is more expensive. But GPE is consolidating the short-term debt for re-financing back into long-term debt which is likely to attract more buyers and cost less in interest.

3. GPE's capital structure also excludes other comprehensive income ("OCI"), which is ordinarily included in equity.

Discussion, Conclusions of Law, and Ruling

Applicants have carried their burden of proving that the actual capital structure of GPE as described by Applicants is more likely to support just and reasonable rates than the proffered alternatives. But the FEAs have shown that the capital structure should include Other Comprehensive Income ("OCI") in equity.

OPC and MEECG argue for a hypothetical capital structure of 50% debt to 50% equity. In support, they cite the exclusion of short-term debt because it is a temporary stand-in for long-term debt, which is ordinarily included in capital structure. The argument for including the short-term debt is not without merit. But its proponents have not shown how including short term debt leads to the structure of 50% debt to 50% equity. Nor have they shown how much of the shift should come from preferred equity. Their proposal lacks evidentiary support and adopting it would be merely arbitrary.

The FEAs challenge Applicants' exclusion of OCI. Applicants argue that, while OCI is ordinarily part of equity, the relevant periods' OCI is more accurately allocated to debt because it comes from settled interest rate derivatives' unamortized net-of-tax income or loss. Applicants cite no provision of USoA supporting that adjustment, so they have not carried their burden of proof on that issue. Therefore, the Commission will order that OCI shall be part of equity.

The Commission concludes that safe and adequate service at just and reasonable rates has better support in a capital structure for each Applicant at the actual capital structure of GPE as Applicants describe it—46.84 % debt to 53.16% equity (52.56% common and 0.60% preferred)—but including OCI, so the Commission will order that capital structure.

iii. Cost of Debt

The Commission is ordering that GPE's consolidated cost of debt be assigned to Applicants at 6.425% and is not ordering the reductions in interest suggested by Staff.

Findings of Fact

1. Aquila committed to assess debt costs to Missouri ratepayers at a rate consistent with a "BBB" credit rating. Aquila lost its investment grade credit rating and had to take on higher-cost debt.

2. When GPE acquired Aquila, now known as GMO, it boosted GMO's credit rating by guaranteeing its debt. As of July 2, 2012, all the Aquila high-cost debt is gone from GMO's books. GMO now has an investment grade credit rating. But GMO does not have ratings as high as KCPL, so GMO still pays more interest than Aquila promised to pass on to ratepayers, and more interest than KCPL has to.

3. GPE's consolidated cost of debt is 6.425%.

Discussion, Conclusions of Law, and Ruling

Applicants and Staff agree that the Commission should assign GPE's consolidated cost of debt to each Applicant, and GPE's practice of issuing securities in Applicants' names supports that practice.

Staff argues that the Commission should order each Applicant's consolidated cost of debt to be 6.187% by reducing GPE's notes as follows:

GPE Note	Recommended Reduction in Basis Points	Basis Point Estimate
\$250 million, 3-year, 2.75%	60 to 75	65
\$350 million, 10-year, 4.85%	60 to 85	65
\$287.5 million, 10-year, 5.292%	110 to 120	115

In support, Staff argues that its adjustments align GMO's cost of debt with KCPL. KCPL's rating, Staff argues, would also be GMO's but for the misdeeds of Aquila. Hence, this is one of several Aquila legacy matters.

Staff's arguments are unpersuasive. Their basis—what GMO would look like if the past were different—is speculation. By contrast, no party disputes that GMO's ratings have improved under current management. And using GPE's consolidated cost of debt is more consistent with the capital structure that the Commission has ordered, which is based on GPE's actual capital structure.

Though succeeding to assets generally means succeeding to liabilities, for Missouri citizens it also means the rescue of a distressed utility and preservation of service. Those considerations suggest that the Commission's treatment of GMO should not stray too far into punitive action. The Commission concludes that a cost of debt at 6.425% will better support safe and adequate service at just and reasonable rates.

Therefore, the Commission concludes that a cost of debt for each Applicant at 6.425%, and without Staff's proposed adjustments, will better support safe and adequate service at just and reasonable rates, so the Commission will order that cost of debt for each of the Applicants.

iv. Transmission Tracker

Applicants have not carried their burden of proving that the Commission should order deferred recording ("a tracker") for transmission costs. The issue is moot because Applicants can already determine how to record that cost by themselves, as they do with almost every cost every day, under the Uniform System of Accounts ("USoA").

Findings of Fact

1. Applicants pay to send and receive power ("transmission") through the territory of regional transmission organizations including the Southwest Power Pool ("SPP"). The costs for transmission include:

Name	USoA Account
Transmission Costs	565
Schedule 1-A Administration Charge	561 and 575
Schedule 12 Assessment Fees	928

2. SPP's regional transmission upgrade projects and increasing SPP administrative fees are increasing Applicants' transmission costs as follows.

Calendar Year	Cost (\$ million)	
	KCP&L	GMO
2012	\$18.4	\$6.8
2014	\$25	\$9.2
2019	\$45.2	\$16.7

Those increases represent an approximately 14% increase per year. Each of those amounts represents more than five percent of the respective applicant's income, computed before those costs.

4. Transmission costs will continue to increase at an accelerating pace.

Discussion, Conclusions of Law, and Ruling

The Applicants ask the Commission to order deferred recording⁵³ (a "tracker") for transmission costs. But that matter is moot because the Commission can grant no practical relief.⁵⁴ No practical relief is possible because Applicants can already "track" transmission cost increases under the plain language of the only authority that any party cites for a tracker.

That authority is the Uniform System of Accounts ("USoA"), which is the set of federal regulations that governs utilities' recording of gains and losses ("items"). 18 CFR 201. The Commission's regulation 4 CSR 240-40.040(1) incorporates USoA's *General Instructions, Definitions, and Balance Sheet Accounts Assets and other Debits* ("Accounts") into the Commission's regulations. 4 CSR 240-40.040(1). Specifically applicable are Accounts 182 and 254, other regulatory liabilities and assets, respectively, set forth at length in Appendix C. Those provisions describe accounts for recording an item outside the year of occurrence ("deferral") for determination in a later action.

Whether a utility may defer an item is the subject of General Instruction No. 7. General Instruction No. 7 provides that the Commission's order is only necessary for an item that is less:

. . . than approximately 5 percent of income, computed before extraordinary items. Commission approval must be obtained to treat an item of less than 5 percent, as extraordinary. [⁵⁵]

"Extraordinary" describes matters subject to deferral, and does not apply to transmission cost increases, as discussed below. But even if transmission cost increases were extraordinary, Applicants' evidence shows that transmission costs are not less than five percent of income. Therefore, no Commission order is needed to defer the transmission costs, and Applicants can decide for themselves whether to defer the transmission costs.

⁵³ Deferred recording was the subject of File No. GU-2011-0392, *In the Matter of the Application of Southern Union Company for the Issuance of an Accounting Authority Order Relating to its Natural Gas Operations* [,] *Report and Order* issued on January 25, 2012. Though that order does not constitute precedent and does not control the Commission. *McKnight Place Extended Care, L.L.C. v. Missouri Health Facilities Review Comm.*, 142 S.W.3d 228, 235 (Mo. App., W.D. 2004), the Commission finds the analysis in that order both insightful and persuasive. The event at issue in File No. GU-2011-0392 was the multi-vortex Joplin tornado of 2011.

⁵⁴ *Precision Invs., L.L.C. v. Cornerstone Propane, L.P.*, 220 S.W.3d 301, 304 (Mo. banc 2007).

⁵⁵ General Instruction No. 7.

Whether to defer an item is a decision that Applicants make every day because it is simply a matter of recording. Recording any item ordinarily means assigning it to the year in which it occurred (“the period”):

[N]et income shall reflect all items of profit and loss during the period with the exception of [certain items].^{56]}

And:

All other items of profit and loss recognized during the year shall be included in the determination of net income for that year. [^{57]}

But, if an item with far-reaching impact for Applicants and their customers falls outside the test year, omitting that item from consideration may threaten just and reasonable rates. To protect just and reasonable rates, the Commission allows deferral for:

Extraordinary items. . . . Those items related to the effects of events and transactions which have occurred during the current period and which are of unusual nature and infrequent occurrence shall be considered extraordinary items. Accordingly, they will be events and transactions of significant effect which are abnormal and significantly different from the ordinary and typical activities of the company, and which would not reasonably be expected to recur in the foreseeable future [^{58]}

That language examines an event’s:

- Time (during current period);
- Effect (significant);
- Rarity (unusual, infrequent, not foreseeably recurring, activities abnormal and significantly different from the ordinary and typical).

Applicants have not proved that the transmission cost increases meet that standard. The projected transmission cost increases are not “extraordinary” within the legal definition because they are not rare or current.

“Rare” does not describe cost increases in the utility business generally. Specifically, Applicants’ evidence shows the following as to transmission. Transmission is an ordinary and typical, not an abnormal and significantly different, part of Applicants’ activities. Also, Applicants showed that paying more for transmission than in the previous year is a foreseeably recurring event, not an unusual and infrequent event. Thus, “items related to the effects of” transmission cost increases are not rare and, therefore, are not extraordinary.

⁵⁶ General Instruction No. 7 (emphasis added).

⁵⁷ General Instruction No. 7.1 (emphasis added).

⁵⁸ General Instruction No. 7 (emphasis added).

As to time, Applicants project increases on a yearly basis so each projection will apply to its respective “current period [.]” But no party cites any authority under which the Commission may order deferral of an item before the item occurs. And that predetermination—a ruling on facts that have not occurred—is what makes a “tracker” different from an accounting authority order under USoA’s plain language. Thus, “items related to the effects of” future transmission cost increases are not current and, therefore, are not extraordinary.

Because Applicants have not shown that the projected transmission increases are current and will be rare, Applicants have not carried their burden of proving that the projected transmission increases are extraordinary. If the increases—once they happen—prove to be less than five percent of income, Applicants may apply for an accounting authority order under the law they cite. If the projected transmission increases prove to be more than five percent of income, they will be subject to deferral without the Commission’s order.

Either way, the law provides a “regulatory mechanism to ensure that increasing SPP transmission expenses between rate cases are appropriately deferred for possible recovery in a future rate proceeding.”⁵⁹ The only thing that the Commission is denying Applicants is a blessing upon the treatment of facts that have not yet occurred, an order for which Applicants cite no authority in the law. Whether the Commission can create a transmission tracker by regulation, or the General Assembly can create a tracker by legislation, or some other jurisdiction has already done either, does not change the result. For those reasons, the Commission concludes that denying a tracker is consistent with the law and does not threaten safe and adequate service at just and reasonable rates, so the Commission will not order a transmission tracker.⁶⁰

v. Winter, Space Heat, and All-Electric

The Commission is changing Applicants’ respective rate designs to bring certain classes of customer closer to paying the cost of serving them (“recovery”). The Commission:

- Is not eliminating and not freezing Applicants’ residential space-heat classes.
- Is shifting⁶¹ KCPL’s costs of service away from small and general service rates and toward large power service as OPC proposes.
- Is increasing KCPL’s first blocks of the residential space heating rates and winter All-Electric General Services rates, and GMO’s non-residential and residential rates, as Staff proposes.

⁵⁹ Reply Post-Hearing Brief of [KCPL] and [GMO] page 25, paragraph 69.

⁶⁰ This conclusion renders it unnecessary to determine whether USoA General Instruction 7 represents unconstitutional retro-active ratemaking, or single-issue ratemaking that is contrary to statute as some parties argue. No party cites any authority under which the Commission may declare a regulation unconstitutional or resort to the statutes with which its own regulation conflicts.

⁶¹ The parties use this term in different ways. For Staff, it means an increase in one place with no corresponding decrease in another. For Applicants and OPC, and this report and order, it means decreasing rates in one schedule and raising them correspondingly in another.

- Is not implementing the increasing residential true-up revenues by the additional 1.00%, with a corresponding equal-percentage revenue neutral decrease in the true-up revenues for all other non-lighting rate classes, proposed by signatories to the *Non-Unanimous Stipulation and Agreement Regarding Class Cost of Service / Rate Design* in File No. ER-2012-0174.
- Is not raising any monthly customer service charge.

The Commission bases those determinations on the credibility of the witnesses supporting the class cost of service studies (“CCoSSs”) and other evidence, and the Commission’s policy choices that, together, suggest relief as follows.

Findings of Fact

1. All of Applicant’s customer classes recover their costs but some recover more than others. Recovery is among the focuses of experts in rate design because how much one class recovers determines how much other classes must recover. That creates the mechanism for one class to subsidize another, the use of which experts in rate design determine based on economic conditions, including those described in section IV.A.i of this report and order.

2. Because winter is Applicants’ off-peak season, certain of Applicants’ rate schedules recover less than their class’s cost of service. Those schedules are, for KCPL:

- Residential general use and space heat – one meter (“RESB”),
- Residential general use and space heat – two meters separately metered, space heat rate (“RESC”),
- All-electric Small General Service (“SGS”), and
- All-electric Medium General Service (“MGS”); and for GMO:
- Residential service with space heating (“L&P MO 920 rate schedule”),
- Residential space heating / water heating – separate meter (“L&P MO 922 Frozen rate schedule”), and
- Non-residential space heating/water heating – separate meter (“L&P MO 941 Frozen rate schedule”).

3. For example, KCPL’s RESB generates a 5.859% return in the summer, but only 2.922% in the winter, and RESC generates 4.161% in the summer and only 2.284% in the winter.

4. Nevertheless, those rates recover their costs of service over the course of a year, do not constitute a discount or promotion, and do not constitute a subsidy of all-electric and space heat customers.

5. If residential space heat rates were eliminated or priced out of the market, Applicants would lose part of their winter load, and the profit margin it represents. To maintain their profitability, Applicants would have to seek that margin through other rates.

6. For example, a typical KCP&L customer’s bill would increase 24.83%. A typical GMO’s L&P customer’s bill would increase 12.58%. For GMO’s space heating customers, \$50.88 per year at the low-use end and \$674.88 for customers at the higher usage level of 4,000 kilowatt hours per month, or 17.53%. Those increases do not consider any increase ordered in this action.

7. To freeze a rate is to close it to new customers. Frozen rate tariff language has proven to be difficult to draft and administer for other services. Such a tariff has caused confusion among the utility, customers, and the Commission. The result was multiple customer complaints and litigation.⁶²

8. On a scale in which 1.0 represents KCPL's system-average rate of return, KCPL's rate classes contribute to KCPL's rate of return as follows.

Residential	0.98
Small General Service	1.98
Medium General Service	1.28
Large General Service	1.05
Large Power Service	0.54

9. KCPL devotes \$431,849,089 of its rate base to its Large Power Service ("LP"), which generates a 3.011% return, compared to the system average return of 5.539%.

10. Rate design sometimes employs two components for billing: a periodic customer charge that does not vary with use, and a volumetric charge that varies with usage. The amount of service the customer uses determines the volumetric charge, so the volumetric charge is more within the customer's control.

Conclusions of Law

Applicants propose that any increase awarded in this report and order apply equally to all classes and rate components, after any adjustment specific to any class, and MEUA-KC concurs. Staff, OPC, and Southern Union agree, but each adds a set of adjustments to remedy the disparity in certain classes between costs and recovery. The parties' proposals include the following.

- Eliminate space heat and all-electric rates (either immediately⁶³ or gradually through freezing⁶⁴),
- Shift revenue among rate schedules,⁶⁵ and
- Raise some space heating and all-electric rates.⁶⁶

Counter-proposals and other matters arise in response. Therefore, the Commission will order that any increase awarded in this report and order apply equally to all classes and rate components, after any adjustment specific to any class, as follows.

⁶² *Briarcliff Developments v. Kansas City Power & Light Company*, Case No. EC-2011-0383, *Report and Order* issued Mar. 7, 2012.

⁶³ Issues List I.6.g.i. and III.7.e.i.

⁶⁴ Issues List I.6.g.ii. and III.7.e.ii.

⁶⁵ Issues List I.6.f.i. and III.7.d.i.

⁶⁶ Issues List I.6.g.iii and I.6.d; and III.e.iii and e'.

Eliminate Space Heating and All-Electric Rates. Southern Union d/b/a Missouri Gas Energy proposes eliminating Applicants' space-heating classes, either immediately or gradually after freezing those classes. In support, Southern Union offers several arguments. The Commission rejects that proposal as follows.

Southern Union alleges that residential space-heating rates represent an unfair subsidy from other customers, because they return less than other classes. The Commission has found otherwise; there is no such subsidy. Contrary to Southern Union's allegations, Applicants have shown that elimination of space heating rates would cause a hardship on Applicant's customers. Moreover, such hardship would be even greater under Southern Union's calculations. Southern Union's alternative, gradual elimination by freezing space heating rates, causes its own set of difficulties, as the Commission has learned from experience.

Southern Union also argues that residential space-heating rates are a policy relic of an earlier time, when the Commission favored electricity over natural gas for reasons that no longer exist, especially price. Southern Union cites the recent drop in natural gas prices. The Commission is aware of that development but is also aware of the investment that customers have made in reliance on those classifications, which represents a commitment that such rates represent among Applicants, customers, and the Commission. The Commission will not abandon its part of that commitment.

Southern Union asks whether it is fair that two of Applicants' customers pay different amounts for electricity just because one is all-electric? The answer is yes, if the record supports that result. Even ignoring Southern Union's obvious incentive to make electricity less attractive than natural gas, the Commission concludes that eliminating residential space heat rates—suddenly or gradually through freezing—does not support safe and adequate electric service at just and reasonable rates.

Revenue Shift among Rate Schedules. For KCPL, the low contribution to return of Large Power ("LP") and high contribution from Small Gas Service ("SGS") and Medium Gas Service ("MGS") requires a remedy.

Based on KCPL's CCoSS, which is in part the basis of the Commission's findings, OPC proposes to increase LP as follows. It takes the difference between LP return (3.011%) and KCPL's system-average return (5.539%). The difference is 2.528% (5.539% - 3.011%). The amount of LP rate base under-contributing is therefore \$10,917,144. (2.528% x \$431,849,089).

Using those amounts, OPC recommends shifting half the under-contributing LP rate base ($\$10,917,144 \times \frac{1}{2} = \$5,458,572$) to decrease SGS and MGS by a 69% / 31% split:

$\$5,458,572 \times 69\% = \$3,319,366$ decrease to SGS,

$\$5,458,572 \times 31\% = \$2,139,206$ decrease to MGS,

with the remaining \$5,458,572 as an increase to LP.

The results are:

- LP increases by \$5,458,572, which is 50% of KCPL's CCoSS shifts.
- MGS decreases by \$2,139,206, which is 39% of the LP increase; and
- SGS decreases by \$3,319,366, which is 61% of the LP increase.

The Commission concludes that the shifts that OPC proposes for KCPL best furthers the policy of moving rates toward recovery. That is because it represents a middle ground between the undesirable results of the status quo (leaving disparities in recovery unaltered) and eliminating all disparities immediately (causing rate shock). The Commission concludes that OPC's proposal will best support safe and adequate service at just and reasonable rates, so the Commission will order the shifts that OPC proposes for KCPL.

Increase Space Heating and All-Electric Rates. In this matter, the Commission must resolve two policies that, as of this date, conflict. The general consensus is that a class of customers should pay for the cost of serving them. But the Commission's finding on lingering economic hardships, as set forth in section IV.A.i of this report and order raises a reluctance to increase rates. This is especially true of residential customers, who cannot simply pass on the expense to someone else. The Commission is applying its policy-making expertise by ordering rates altered according to the proposal of Staff.

Staff proposes to gradually move recovery toward winter costs by increasing certain rates, in addition to any other revenue increase required by this report and order, as follows. For KCPL, 5% to each of the following:

- First winter block of RESB (residential general use and space heat – one meter); and
- Winter season separately metered space heat rate of RESC (residential general use and space heat – two meters).

For GMO, 6% to each of the following:

- L&P MO 920 rate schedule (residential service with space heating), the two winter energy block rates;
- L&P MO 922 Frozen rate schedule (residential space heating / water heating – separate meter), the winter energy rate; and
- MO 941 Frozen rate schedule (“non-residential space heating / water heating – separate meter”).

OPC concurs as to the KCPL increases. As to all Staff's proposed increases, the Commission concludes that safe and adequate service at just and reasonable rates finds the most support in the shifts that Staff proposes for KCPL. Therefore, the Commission will order those increases as Staff recommends.

Additional 1% for KCPL Residential Rates. The signatories to the KCPL *Non-Uniform Stipulations and Agreements Regarding Class Cost of Service / Rate Design* agree that the Commission should increase KCPL residential true-up revenues by 1% in addition to any other increase, with a corresponding equal-percentage revenue decrease in true-up revenues for all other non-lighting rate classes. OPC objects, and AARP and CCoMO join in that objection. The objectors are correct that the slow recovery from economic woes, on which the Commission heard much testimony during local public hearings, supports no more increase in residential rates than the Commission has already reluctantly ordered. Therefore, the Commission will rule in favor of OPC and against the 1% residential increase that OPC opposes.

Customer Charge.⁶⁷ OPC asks the Commission that any increase in residential rates not apply to the monthly customer charge. AARP and CCoMO concur. Because volumetric charges are more within the customer's control to consume or conserve, the volumetric rate is the more appropriate to increase. Therefore, the Commission will order that any increase in residential rates should not apply to the monthly customer charge.

Rulings. The Commission concludes that the grant and denial of rate shifts and increases as described above will best support safe and adequate service at just and reasonable rates, so the Commission will order those shifts and increases accordingly.

vi. PURPA

Staff seeks a determination that the Commission and Applicants need take no further actions under certain federal laws. That request has no opposition from any party.

Findings of Fact

1. To address the four Energy Independence and Security Act of 2007 ("EISA") standards, the Commission established Files No.

- a. EW-2009-0290 ("IRP Docket"),⁶⁸
- b. EW-2009-0291 ("Rate Design Docket"),⁶⁹ and
- c. EW-2009-0292 ("Smart Grid Docket").⁷⁰

In each of those files, the Commission issued its *Order Finding Consideration / Implementation of New Federal Standards through Workshop and Rulemaking Procedures Is Required*,⁷¹ stating at page 5

The Commission has satisfied the requirements for consideration of the new EISA standards, and on the basis of the quasi-legislative record created in these workshops, the Commission determines that no comparable standards have been considered that would constitute prior state action and prohibit the Commission from taking any further action in relation to the new EISA standards [.]

2. The Commission promulgated a rulemaking in File No. EX-2010-0368,⁷² as a result of which Commission regulations 4 CSR 240-20.093, 20.094, 3.163, and 3.164The rules became effective on May 30, 2011.

⁶⁷ Issues List I.6.f.ii and III.7.d.2.

⁶⁸ In the Matter of the Consideration of Adoption of the PURPA Section 111(d)(16) Integrated Resource Planning Standard as Required by Section 532 of the Energy Independence and Security Act of 2007.

⁶⁹ In the Matter of the Consideration of Adoption of the PURPA Section 111(d)(17) Rate Design Modifications to Promote Energy Efficiency Investments Standard as Required by Section 532 of the Energy Independence and Security Act of 2007.

⁷⁰ In the Matter of the Consideration of Adoption of the PURPA Section 111(d)(18), Smart Grid Investments Standard, and the PURPA Section 111(d)(19), Smart Grid Information Standard, as Required by Section 1307 of the Energy Independence and Security Act of 2007.

⁷¹ Issued on November 23, 2009.

⁷² In the Matter of the Consideration and Implementation of Section 393.1075, The Missouri Energy Efficiency Investment Act.

3. The Commission's promulgation of a rulemaking revising Chapter 22 Electric Resource Planning Rules in File No. EX-2010-0254⁷³ became effective on June 30, 2011.

4. The Commission opened a repository on December 29, 2010, for information concerning the Smart Grid in Missouri as File No. EW-2011-0175. In File No. EW-2011-0175, on January 13, 2011, Staff, filed the *Missouri Smart Grid Report* Among other things, the *Missouri Smart Grid Report* presents issues and concerns and identifies key issues requiring further emphasis, including Smart Grid deployment, planning, implementation, cost recovery, cyber security and data privacy, customer acceptance and involvement, and customer savings and benefits. It recommends the Commission hold a Smart Grid workshop every six months for information exchange and sharing of best practices and educational opportunities; and also recommends the Commission open a docket to address cost recovery issues.³⁵⁹

5. The Commission has also held Smart Grid conferences on June 28, 2010, and November 29, 2011, and the Smart Grid was also the recent subject of the *PSConnection*, a publication of the Commission. On July 17, 2012, the Commission issued an *Order Directing Notice and Directing Filing* in File No. EW-2013-0011 to gather information related to cyber vulnerabilities and the integrity of the electric utilities' internal cyber security practices. This workshop proceeding provides another opportunity for the Commission to explore issues and take action related to the PURPA Smart Grid Investments standard. The Commission on October 5, 2012 issued a *Notice And Order Setting On-The-Record Proceeding* scheduling an on-the-record proceeding in File No. EW-2013-0011 for November 26, 2012 regarding cyber security practices.

6. In 2009, Governor Nixon signed Senate Bill 376, the "Missouri Energy Efficiency Investment Act," with a stated policy ⁷⁴ to "value demand-side investments equal to traditional investments in supply and delivery infrastructure and allow recovery of all reasonable and prudent costs of delivering cost-effective demand-side programs."

7. The Commission has a workshop docket, Case No. EW-2010-0187, open to investigate how to achieve its statutory responsibilities under the Missouri Energy Efficiency Investment Act ("MEEIA"),⁷⁵ among other things, within the background of Federal Energy regulatory Commission ("FERC") policies that eliminate barriers to demand response and that direct the Midwest Independent Transmission System Operator ("MISO") and the Southwest Power Pool ("SPP") to accommodate state policy regarding retail customer demand-side activity.

8. On December 22, 2011, KCPL⁷⁶ and GMO⁷⁷ each submitted a MEEIA application.

9. KCPL dismissed its action on February 17, 2012. The Commission closed that file on March 6, 2012. Nevertheless, the Commission has in place the framework necessary to make a determination on the associated PURPA principles.

⁷³ In the Matter of a Proposed Rulemaking Regarding Revision of the Commission's Chapter 22 Electric Utility Resource Planning Rules.

⁷⁴ Section 393.1075.3, RSMo Supp. 2012.

⁷⁵ Section 393.1075, RSMo. Supp. 2012.

⁷⁶ File No. EO-2012-0008.

⁷⁷ File No. EO-2012-0009.

10. In GMO's action, certain parties filed the *Non-Unanimous Stipulation And Agreement Resolving KCP&L Greater Missouri Operations Company's MEEIA Filing* ("GMO MEEIA settlement"), filed in File No. ER- 2012-0175 as Exhibit No. 392.⁷⁸

11. On November 7, 2012, in File Nos. ER-2012-0174 and ER-2012-0175, the Commission issued an *Order Incorporating Unopposed Non-Unanimous Stipulations And Agreements* in which it incorporated, as if fully set forth at length, the GMO MEEIA agreement as modified by the October 26, 2012 *Non-Unanimous Stipulation And Agreement Regarding Low-Income Weatherization And Withdrawal Of Objection And Request For Hearing* and October 29, 2012 *Non-Unanimous Stipulation And Agreement Resolving KCP&L Greater Missouri Operations Company's MEEIA Filing*, among other documents.

12. On November 15, 2012, the Commission in File No. EO-2012-0009 issued an *Order Approving Non-Unanimous Stipulation and Agreement Resolving KCP&L Greater Missouri Operations Company's MEEIA Filing*.

Discussion, Conclusions of Law, and Ruling

The Commission must consider and determine whether to implement each of the four "new" Public Utility Regulatory Policies Act of 1978 ("PURPA") Section 111(d) standards for electric utilities established by Congress through the Energy Independence and Security Act of 2007 ("EISA") so as to carry out the purposes of PURPA, which are to encourage:

- (1) conservation of electric energy,
- (2) efficiency in the use of facilities and resources by electric utilities, and
- (3) equitable rates to consumers of electricity.⁷⁸

If the Commission determines that a standard is appropriate to carry out the above-noted purposes, but declines to implement it, the Commission must state in writing its reasons. The law required the Commission to complete its consideration and determination of each standard no later than December 19, 2009. Absent such determination, the Commission is to consider whether or not it is appropriate to implement such standard to carry out the above noted purposes in the first general rate case for each individual electric utility commenced after December 19, 2010. Staff asks the Commission to consider each standard and make its determination with respect to Applicants.

PURPA Section 111(d)(16), Integrated Resource Planning Standard as required by Section 532 of EISA, requires state commission consideration of whether to implement the following:

- (A) integrate energy efficiency resources into utility, State, and regional plans; and
- (B) adopt policies establishing cost-effective energy efficiency as a priority resource.

While not specifically making a determination to implement PURPA Section 111(d)(16), the Commission has promulgated rulemakings to address the principles of that section. Therefore, the Commission concludes that nothing remains for the Commission to determine in response to PURPA Section 111(d)(16) for KCPL and GMO.

⁷⁸ On November 19, 2012.

PURPA Section 111(d)(17), Rate Design Modifications to Promote Energy Efficiency Investments Standard as required by Section 532 of EISA, requires state commissions to consider whether to implement:

- (1) removing the throughput incentive and disincentives to energy efficiency;
- (2) providing utility incentives for successful management of energy efficiency programs;
- (3) including the impact of energy efficiency as one of the goals of retail rate design;
- (4) adopting rate designs that encourage energy efficiency;
- (5) allowing timely recovery of energy efficiency related costs;
- and
- (6) offering energy audits, demand-response programs, publicizing the benefits of home energy efficiency improvements and educating homeowners about Federal and State incentives.

The Commission concludes that no further determination is needed in response to PURPA Section 111(d)(17) for Applicants.

PURPA Section 111(d)(18), the Smart Grid Investments Standard, requires the Commission to consider and determine whether the following is appropriate to implement to carry out the purposes of PURPA:

(A) **IN GENERAL** – Each State shall consider requiring that, prior to undertaking investments in nonadvanced grid technologies, an electric utility of the State demonstrate to the State that the electric utility considered an investment in a qualified smart grid system based on appropriate factors, including --

- (i) total costs;
- (ii) cost-effectiveness;
- (iii) improved reliability;
- (iv) security;
- (v) system performance; and
- (vi) societal benefit.

(B) **RATE RECOVERY** – Each State shall consider authorizing each electric utility of the State to recover from ratepayers any capital, operating expenditure, or other costs of the electric utility relating to the deployment of a qualified smart grid system, including a reasonable rate of return on the capital expenditures of the electric utility for the deployment of the qualified smart grid system.

(C) **OBSOLETE EQUIPMENT** – Each State shall consider authorizing any electric utility or other party of the State to deploy a qualified smart grid system to recover in a timely manner the remaining book-value costs of any equipment rendered obsolete by the deployment of the qualified smart grid system, based on the remaining depreciable life of the obsolete equipment.

PURPA Section 111(d)(19), the Smart Grid Information Standard, requires the Commission to consider and determine whether it is appropriate that all electricity purchasers and other interested parties should be provided access to information from their electricity provider related to, among other things, time-based prices, usage, and sources of power and type of generation, with associated greenhouse gas emissions for each type of generation, to the extent such information is available on a cost-effective basis, so as to carry out the purposes of PURPA. The standard appears in EISA as follows:

(A) **STANDARD.** – All electricity purchasers shall be provided direct access, in written or machine-readable form as appropriate, to information from their electricity provider as provided in subparagraph (B).

(B) **INFORMATION.** – Information provided under this section, to the extent practicable, shall include:

(i) **PRICES.** – Purchasers and other interested persons shall be provided with information on –

(I) time-based electricity process in the wholesale electricity market; and

(II) time-based electricity retail prices or rates that are available to the purchasers.

(ii) **USAGE.** – Purchasers shall be provided with the number of electricity units, expressed in kwh, purchased by them.

(iii) **INTERVALS AND PROJECTIONS** – Updates of information on prices and usage shall be offered on not less than a daily basis, shall include hourly price and use information, where available, and shall include a day-ahead projection of such price information to the extent available.

(iv) **SOURCES** – Purchasers and other interested persons shall be provided annually with written information on the sources of the power provided by the utility, to the extent it can be determined, by type of generation, including greenhouse gas emissions associated with each type of generation, for intervals during which such information is available on a cost-effective basis.

(C) **ACCESS** – Purchasers shall be able to access their own information at any time through the internet and on other means of communication elected by that utility for Smart Grid applications. Other interested persons shall be able to access information not specific to any purchaser through the Internet. Information specific to any purchaser shall be provided solely to that purchaser.

The Commission has established the appropriate avenues for monitoring smart grid activities and no greater ongoing activity is needed in response to PURPA sections 111(d)(18) and 111(d)(19).

B. KCPL Only (ER-2012-0174): Additional Resource Planning

The following matter relates to KCPL only, and not to GMO.

- The Commission is not ordering procedures and standards in addition to those already provided by law for examining the prudence of environmental protection measures at Montrose and La Cygne.

Sierra Club, OPC, and the consumer groups ask the Commission to order procedures and standards, related to environmental retrofits at coal-fired plant, in addition to those already existing at law.

Findings of Fact

1. When running a power plant costs more than the revenue it generates, it is time to consider retiring the plant. Retirement of coal-fired plants is common for several reasons. The cost of complying with environmental regulations are rising. Market prices for natural gas and wholesale electricity are declining. The availability of alternative resources like renewable energy and energy efficiency are growing. Those trends make sales of electricity off-system less profitable.

2. KCPL owns 50 percent of the coal-fired La Cygne generating plant. The only other owner of La Cygne is Westar. That power plant has two units, one of which started operating in 1973 and the other of which started operating in 1977.

3. KCPL also owns Montrose Generating Station, which consists of three coal – fired generating units built in 1958, 1960, and 1964

4. To comply with environmental standards, KCPL is investing a highly confidential amount in Montrose and approximately \$1.23 billion in La Cygne. Of that latter amount, Westar will pay 50 percent to KCPL when the work is done, which will be approximately June 2015. KCP&L's 2012 IRP filing addresses the economics of retrofitting coal units at La Cygne and Montrose versus retiring them.

Discussion, Conclusions of Law, and Ruling

In support of its proposed orders for more procedures and standards, Sierra Club alleges that retrofitting La Cygne and Montrose is economically inefficient, but the Commission will not pre-determine the prudence of those expenses.

Sierra Club also cites the possibility of rate shock because the Commission cannot include the retrofit costs in rates not until that work is done. That is because of an initiative passed in 1976:

Any charge made or demanded by an electrical corporation for service, or in connection therewith, which is based on the costs of construction in progress upon any existing or new facility of the electrical corporation, or any other cost associated with owning, operating, maintaining, or financing any property before it is fully operational and used for service, is unjust and unreasonable, and is prohibited.⁷⁹

That provision bars construction work in progress ("CWIP"), like the retrofit, from rate base and makes graduated accommodation nearly impossible. Sierra Club also cites the possibility of imprudent expenditures. On those bases, Sierra Club, OPC AARP, and the Consumers Council of Missouri ask the Commission to prescribe an ongoing formal procedure during retrofitting.

⁷⁹ Section 393.135, RSMo 2000

Sierra Club acknowledges the existence of the Integrated Resource Planning ("IRP") procedure, KCPL's informational meetings with Staff and OPC, and the Commission's periodic prudence reviews. Nevertheless, Sierra Club alleges that some kind of ongoing formal hearing procedure would benefit shareholders and customers. The cost of such proceedings to rate-payers does not figure into Sierra Club's proposal. Absent a full analysis of the effects on ratepayers, Sierra Club's proposals are unpersuasive as a matter of fact and policy. Moreover, no rulemaking, IRP, or prudence review is before the Commission in this contested case.

The Commission concludes that the proposed additional standards and procedures do not support safe and adequate service at just and reasonable rates, so the Commission will not order the proposed procedures or standards for KCPL in this contested case.

C. GMO Only (ER-2012-0175)

The following matters relate to GMO only, and not to KCPL.

- Crossroads: the Commission is updating, but not changing, the method of valuing amounts to include in MPS rate base, and exclude transmission costs
- Off-System Sales: the Commission is making no ruling because none is sought.
- FAC: The Commission is not changing the sharing percentage, ordering flow-through of both gains and losses for REC flow-through, excluding transmission costs, continuing current reporting, and ordering new tariff terminology.

i. Crossroads

The parties dispute the value for MPS rate base of the Crossroads as to physical plant, depreciation, accumulated tax set-off and transmission costs. The Commission already ruled on these issues in GMO's last general rate action ("previous rulings"), which was in File No. ER-2010-0356.⁸⁰ GMO asks to increase the amounts in rate base attributable to Crossroads. Dogwood Energy, LLC, ("Dogwood,") which owns a generating facility), and Staff oppose that claim. MECG, MEUG, and Ag Processing, Inc. a Cooperative ("Ag Processing," a customer) ask to reduce those amounts. No party has shown that the Commission should change its previous rulings. The Commission incorporates, as if fully set forth its findings of fact and conclusions of law from the previous rulings and recapitulates only the most salient facts relevant to Crossroads' valuation only as necessary to show how the movants for change have failed to meet their burden of proof.

Generally. The following matters relate generally to both valuation and transmission costs.

⁸⁰ *In the Matter of the Application of KCP&L Greater Missouri Operations Company for Approval to Make Certain Changes in its Charges for Electric Service, Report and Order*, issued May 4, 2011.

Findings of Fact

1. GMO's MPS service area receives part of its power from Crossroads Energy Center ("Crossroads"), a generating facility in Clarksdale, Mississippi.
2. In the previous rulings, the Commission determined that the fair market value of Crossroads was \$61.8 million before depreciation and deferred taxes.
3. In the previous rulings, the Commission denied the costs of transmitting power from Crossroads to MPS territory.

Discussion, Conclusions of Law, and Ruling

The parties may seek review of matters already determined under the previous rulings before the current Commission, which may alter those rulings.

Every order or decision of the commission shall continue in force either for a period which may be designated therein or until changed or abrogated by the commission [⁸¹]

But even if GMO met its burden of proof, administrative and judicial economy would support a reservation of ruling in this report and order. That is because the previous rulings are pending before the Court of Appeals.⁸² Departure from the previous rulings before the Court of Appeals has reviewed them invites confusion and uncertainty to these matters for all involved.

Plant, Depreciation, Taxes. The parties dispute the value that Crossroads represents for MPS rate base, including physical plant, depreciation, and deferred taxes. GMO has not shown that GMO's proposed valuation best supports safe and adequate service at just and reasonable rates. The preponderance of the evidence shows the updated values as follows.

Findings of Fact

1. Crossroads is the property of the City of Clarksdale, Mississippi. GMO neither owns nor leases any part of Crossroads. GMO has a capital lease on the power generated at Crossroads that includes the duty to pay for, and the right to inspect, Crossroads operations.
2. GMO uses Crossroads power for peak demand in the summer. Crossroads runs less than half of the summer's days and has never run in the winter. Nevertheless, GMO pays for gas to be available in the winter.
3. The previous rulings recognized that Crossroads represents some value to GMO customers, and based valuation upon the market for the same technology, and on GPE's valuation of Crossroads in filings with the United States Securities and Exchange Commission ("SEC").⁸³

⁸¹ Section 386.490.2, RSMo 2000. Another standard of proof appears in the statutes for "[a]ll proceedings arising under the provisions of" chapter 386, RSMo: A "party seeking to set aside any order of said commission [must] show by clear and satisfactory evidence that the order of the commission complained of is unreasonable or unlawful as the case may be. Section 386.430, RSMo 2000. Clear and satisfactory evidence is a standard higher than the preponderance of the evidence. *State ex rel. Taylor v. Anderson*, 254 S.W.2d 609, 615 (Mo. Div. 1, 1953). Missouri courts equate it with clear and convincing evidence. *Hackbarth v. Gibstine*, 182 S.W.2d 113, 118 (St.L. Ct. App. 1944). The Commission need not decide whether the higher standard applies because GMO did not meet the lower preponderance of evidence in addressing the previous rulings.

⁸² Case No. WD75038, *KCP&L v. Missouri Public Service Comm'n*.

⁸³ File No. ER-2010-0356, *Report and Order* page 96.

4. In a Joint Proxy Statement/Prospectus and amendments filed with the SEC between May and August 2007, Aquila (GMO under its previous name and management) and GPE stated three times that the fair market value of Crossroads was \$51.6 million. Aquila and GPE stated that they based the evaluation on sales of comparable assets.

5. The comparable assets were combustion turbines of the same type as those in Crossroads. Aquila Merchant installed the turbines in two Illinois facilities: Raccoon Creek and Goose Creek, both of which facilities it sold at a loss. Aquila Merchant (Aquila's unregulated affiliate) sold other turbines to utilities in Nebraska and Colorado at a loss. Aquila Merchant returned the last of those turbines to the manufacturer and, in so doing, surrendered to the manufacturer the deposit it had put down on that turbine. Those sales occurred between 2006 and 2008.

6. Aquila Merchant also tried to sell Crossroads, but could come to terms with no buyer, so it transferred Crossroads to a subsidiary of Aquila. Aquila became financially distressed and GPE bought it, thus acquiring Crossroads. GPE also tried, but failed, to sell Crossroads to an outside buyer. GPE sold Crossroads to Aquila, which it later renamed GMO.

7. Using the same valuation principles as in the previous rulings, the value of Crossroads updated as of August 31, 2012, is \$62,609,430. Based on a fair market value of Crossroads at \$62,609,430, the applicable depreciation is \$10,033,437 and the deferred tax due on Crossroads is \$4,333,301.

Discussion, Conclusions of Law, and Ruling

The parties agree generally that depreciation and accumulated taxes must follow the valuation of physical plant.

GMO argues that Crossroads' rate base value is GMO's depreciated net original cost, sometimes called depreciated book value, of \$82.7 million. In support, GMO offers case law from another jurisdiction,⁸⁴ which states that all evidence bearing on value is relevant, but pre-dating the Commission regulation that adopts USoA.⁸⁵ USoA defines cost as beginning with the amount incurred by the entity that first put the asset to public service. GMO relies on Aquila's building costs, the price in a transaction between affiliated entities GPE and GMO, and an estimate expressly designed to justify the price paid in that transaction, none of which are persuasive.

Holding GMO to those statements nonetheless, MECG suggests that, if the Commission departs from its previous rulings, the Commission should embrace the values that GPE and GMO (then Aquila) assigned in its filings with the SEC.

MECG also cites the Commission's affiliate transaction rule, which sets the cost of goods from an affiliate at the lesser of either (i) fully distributed cost or (ii) fair market price.⁸⁶ Staff emphasizes fair market price as determined in the previous rulings. Then, as now, Staff argues, the fair market price is determinable from the sales of the comparable Raccoon Creek and Goose Creek facilities. The Commission stated:

⁸⁴ *Springfield Gas & Elec. Co. v. PSC*, 10 F.2d 252, 255 (W.D. Mo. 1925); and *State ex rel. Missouri Water Co. v. PSC*, 308 S.W.2d 704, 717 (Mo. 1957).

⁸⁵ 4 CSR 240-20-030.

⁸⁶ 4 CSR 240-20.015(2)(A).

The ten 75 MW General Electric model 7EA combustion turbines installed at Raccoon Creek and Goose Creek that Aquila Merchant sold to AmerenUE in 2006 are ten of the eighteen combustion turbines Aquila Merchant bought at the same time. Four of those eighteen were installed at Crossroads. The turbines sold at an average installed cost of \$205.88 per kW. Based on that average installed cost of \$205.88 per kW, the 300 MW of combustion turbines at Crossroads would have an installed cost of \$61.8 million.⁸⁷

Staff provides an analysis based on that method in direct testimony on its true-up accounting schedules. That amount is less than GMO's cost figure and therefore controls. In this regard, the arguments for maintaining the status quo analysis rebuts GMO's claim for a higher amount in rate base.

Finally, MEUG and Ag Processing succinctly suggest that the MPS rate base value of Crossroads is zero. The argument has an elegant simplicity. After all, GMO does not own or lease Crossroads. And constructing a surrogate value for Crossroads is not the only way to account for the power that GMO buys from the City of Clarksdale, Mississippi. But the evidence does not weigh in that direction. The Commission rejected Staff's argument to disallow Crossroads from rate base entirely in the previous rulings⁸⁸ because some benefit from distant Mississippi does reach the MPS customers and that remains true today. Therefore, the Commission will not value Crossroads at zero.

Crossroads is a relic of the failed utility Aquila. A full recital of Aquila's tortured history is unnecessary to the Commission's rulings,⁸⁹ because it only raises the issue of how long the Commission will visit the sins of the predecessor on the successor. It is true that GMO is the same legal entity as Aquila, but it is also true that management is different.

Therefore, the Commission will order that the value of Crossroads for GMO's MPS rate base shall be \$62,609,430 without transmission cost. At that value, GMO and Staff agree, the accumulated depreciation is \$10,033,437 and the accumulated deferred taxes are \$4,333,301. Those values best support safe and adequate service at just and reasonable rates for MPS, so the Commission will order those amounts to be included in GMO's MPS rate base.

Transmission Costs. GMO asks the Commission to depart from the previous rulings and include in MPS rates the costs of transmitting power from Crossroads to MPS territory but it has not carried its burden of proof on that claim.

⁸⁷ File No. ER-2010-0356, *Report and Order*, page 94 (citations omitted).

⁸⁸ File No. ER-2010-0356, *Report and Order*, page 99.

⁸⁹ MEGC spares its readers no gruesome detail. *Initial Post-Hearing Brief of [MEGC] (GMO Issues)*, pages 59-73.

Findings of Fact

1. Crossroads is 500 miles from GMO's MPS territory.
2. Between the territory of MPS and Crossroads are the territories of regional transmission organizations ("RTOs"). RTOs collect payment for the transmission of power through their territories. GMO does not belong to all those RTOs so GMO must pay higher fees for transporting power than to an RTO of which GMO is a member.
3. There are generating facilities closer, including Dogwood's facility and the South Harper plant. Even though Crossroads provides power for GMO only during half of the days in the summer, GMO pays about \$5.2 million to transmit power from Crossroads all year round. The high cost of transmission is not outweighed by lower fuel costs in Mississippi.

Discussion, Conclusions of Law, and Ruling

GMO has not carried its burden of proof on transmission costs. GMO alleges that the lower price of fuel in Mississippi outweighs the cost of transmission. The Commission has found that the evidence preponderates otherwise.

GMO also argues that the Commission must include transmission costs because FERC has approved a rate for that service. In support, GMO cites opinions providing that the Commission cannot nullify FERC's rate or any other FERC ruling.

But as Dogwood explains, and Staff and MECG agree, those opinions do not bar the Commission from determining the prudence of buying power from Crossroads. For example:

Without deciding this issue, we may assume that a particular *quantity* of power procured by a utility from a particular source could be deemed unreasonably excessive if lower cost power is available elsewhere, even though the higher cost power actually purchased is obtained at a FERC-approved, and therefore reasonable, *price*. [⁹⁰]

In other words, FERC's rate-setting for a facility requires neither the purchase of power, nor approval of that purchase, from that facility.

Moreover, in the presence of a FERC-approved rate, the courts have opined that review of cost prudence remains within the Commission's jurisdiction.

⁹⁰ Nantahala Power and Light Co. v. Thornburg, 476 U.S. 953, 972 (1986).

Regarding the states' traditional power to consider the prudence of a retailer's purchasing decision in setting retail rates, we find no reason why utilities must be permitted to recover costs that are imprudently incurred; those should be borne by the stockholders, not the rate payers. Although Nantahala underscores that a state cannot independently pass upon the reasonableness of a wholesale rate on file with FERC, it in no way undermines the long-standing notion that a state commission may legitimately inquire into whether the retailer prudently chose to pay the FERC-approved wholesale rate of one source, as opposed to the lower rate of another source. ^[91]

And to recognize the marginal value of purchased power from Crossroads does not constitute an endorsement of its inflated cost.

Therefore, the Commission concludes that including the Crossroads transmission costs does not support safe and adequate service at just and reasonable rates, and the Commission will deny those costs.

ii. Off-System Sales Margins

Staff expresses concerns at the amount of negative margins in GMO's off-system sales compared to other regulated electric companies and asks the Commission to urge GMO to do better. GMO promises to try. No party seeks any relief on this matter any longer so the Commission will order none, and no further findings of fact and conclusions of law are required.

iii. Fuel Adjustment Clause

The fuel and purchased power adjustment clause ("FAC") is, essentially, a device by which GMO can pass increases or decreases in fuel or purchased power costs to its customers without a general rate action.

AARP and CCoMO argue for an end to GMO's FAC, and all FACs, on policy grounds. But the General Assembly has determined that the Commission shall have discretion to order an FAC. AARP and CCoMO have not shown that an FAC for GMO makes safe and adequate service at just and reasonable rates impossible, so the Commission will not grant AARP and GMO's request.

For GMO's FAC, the Commission is ordering:

- No change in the sharing mechanism.
- Flow-through of revenues from excess RECs.
- Specific exclusion of Crossroads transmission costs.
- Continued reporting.
- New tariff language.

⁹¹ Kentucky W. Virginia Gas Co. v. Pennsylvania Pub. Util. Comm'n, 837 F.2d 600, 609 (3d Cir. 1988).

Sharing Percentages. The sharing percentage splits fuel and purchased power price fluctuations between GMO and its customers.

Findings of Fact

1. The essence of the current FAC is that fluctuations in the price of fuel and purchased power, up or down from an established baseline, pass through to GMO customers at 95%, the remaining 5% is GMO's to pay or retain.
2. The record shows no incident of imprudent GMO purchasing.
3. The 95%-5% sharing has been enough incentive for GMO to maintain prudence in its purchases.

Discussion, Conclusions of Law, and Ruling

In simplified terms, an FAC measures fluctuations in the price that GMO pays for fuel and purchased power and allows GMO to pass such fluctuations through to customers between general rate actions:

1. . . . periodic rate adjustments outside of general rate proceedings to reflect increases and decreases in its prudently incurred fuel and purchased-power costs, including transportation. [⁹²]

An FAC must not compromise the opportunity to earn a fair rate of return; and include periodic true-ups, prudence reviews, refunds, and review during a general rate action.⁹³ The statutes also allow incentives to look for lower prices:

The commission may, in accordance with existing law, include in such rate schedules features designed to provide the electrical corporation with incentives to improve the efficiency and cost-effectiveness of its fuel and purchased-power procurement activities. [⁹⁴]

Among those incentives is the sharing percentage.

Essentially, under the current sharing percentage, of any price decrease, GMO gets to keep 5% and the rest passes on to customers in the form of a rate decrease. And of any price increase, GMO has to pay 5% and the rest passes on to customers in the form of a rate increase. Staff proposes an 85%-15% split.

⁹² Section 386.266.1, RSMo Supp. 2012.

⁹³ Section 386.266.1, RSMo Supp. 2012.

⁹⁴ Section 386.266.1, RSMo Supp. 2012.

In support, Staff alleges that the current split does not give GMO enough incentive to seek the best prices. In support, Staff offers evidence related to GMO's satisfaction with the current split, its transactions with KCPL, and its use of short-term purchase contracts. None of that is persuasive because Staff has cited no incident of imprudent purchasing. "[M]ere speculations . . . do not demonstrate that the Commission act[s] unreasonably in permitting this particular FAC."⁹⁵

The Commission concludes that GMO's current FAC sharing percentages of 95%-5% better support safe and adequate service at just and reasonable rates than 85%-15%, so the Commission will order GMO's current percentages for GMO's FAC.

REC Flow-Through. Staff proposes that, if GMO has more renewable energy certificates than it needs for compliance with the renewable energy laws⁹⁶ ("excess RECs"), and GMO sells those excess RECs, the proceeds must pass through the FAC like a fuel price decrease. GMO proposes that the costs of those RECs pass through the FAC, too, like a fuel price increase. Staff's proposal is consistent with law and GMO's proposal is contrary to law as follows.

Findings of Fact

1. When GMO customers pay their bills, GMO uses that money for a variety of purposes, including purchasing power. GMO has agreements to purchase power from sellers of renewable energy, including wind and methane. Purchases or use of power from those sources generate renewable energy certificates ("RECs").
2. RECs are a measure of compliance with laws promoting the use of renewable energy. When purchasing power, the REC does not cost extra. If GMO has more RECs than it needs to satisfy the requirements of law ("excess RECs"), it is prudent practice to sell them.
3. Because GMO customers paid the money that generated the REC, if GMO sells the REC, it sells something that the customers bought.

Discussion, Conclusions of Law, and Ruling

The FAC law provides that the Commission may use GMO's FAC to encourage efficient fuel and power purchasing:

The commission may, in accordance with existing law, include in such rate schedules features designed to provide the electrical corporation with incentives to improve the efficiency and cost-effectiveness of its fuel and purchased-power procurement activities. [⁹⁷]

⁹⁵ *State ex rel. Noranda Aluminum, Inc. v. Pub. Serv. Comm'n of State*, 356 S.W.3d 293, 314 (Mo. App., S.D. 2011).

⁹⁶ Section 393.1030, RSMo Supp. 2012; and Commission regulation 4 CSR 240-20.100.

⁹⁷ Section 386.266.1, RSMo Supp. 2012.

Making sure that GMO does not retain the revenue from excess RECs constitutes an incentive to purchase renewable power efficiently.

GMO proposes to pass the costs of excess RECs on to customers through the FAC but Staff cites 4 CSR 240-20.100(6)(A)16, which bars GMO's proposal:

RES compliance costs shall only be recovered through an RESRAM or as part of a general rate proceeding and shall not be considered for cost recovery through an environmental cost recovery mechanism or fuel adjustment clause or interim energy charge.

That law bars the pass-through of REC costs through GMO's FAC. Even without that regulation, GMO's proposal constitutes a disincentive to purchase renewable power efficiently.

Staff's proposal supports safe and adequate service at just and reasonable rates, so the Commission will order excess REC revenues to pass through the FAC, but not the costs of RECs.

Crossroads Transmission. Several parties ask the Commission to order that GMO's FAC tariff sheets state expressly that GMO's FAC excludes transmission costs related to the Crossroads. Insofar as the Commission has determined that no transmission costs from Crossroads will enter GMO's MPS rates, there is no further dispute, and no further findings of fact and conclusions of law are required. The Commission will order GMO's FAC clarified to state that GMO's FAC excludes transmission costs related to Crossroads.

Additional Reporting. Staff and GMO dispute only whether the Commission should order the reporting in Appendix D to continue. GMO objects only to the implication that it has failed to deliver something demanded of it. That dispute requires no findings of fact and no conclusions of law because no party seeks relief on it. Therefore, without any finding that GMO has failed to do anything listed in Appendix D, the Commission will order GMO to do, or continue to do, the reporting listed in Appendix D.

Changes to FAC Tariff Sheet Terminology. Staff asks the Commission to order GMO's FAC tariff modified to include replacement sheets that, without making substantive changes, employ standard terminology proposed for all of the Missouri regulated electrical corporations FACs. No party opposes that request so the Commission makes no findings of fact and no conclusions of law. Therefore, the Commission will order that any FAC tariff sheets filed pursuant to this report and order shall employ the language sought by Staff as set forth in the revised exemplar FAC tariff sheets.

V. Compliance Tariffs

For those reasons, the Commission will reject the tariffs and order the filing of new tariff sheets in compliance with this report and order ("compliance tariffs"). The parties request approval of such compliance tariffs effective on January 26, 2013. To accommodate that request, the Commission will expedite the effective date for this decision,⁹⁸ the filing date for compliance tariffs, and the filing date for Staff's recommendation on the compliance tariffs.

⁹⁸ Section 386.490.2, RSMo 2000.

THE COMMISSION ORDERS THAT:

1. The provisions of the following documents are incorporated into this order as if fully set forth, either as the Commission's order or as a consent order, as described in the body of this report and order:

a. In File Nos. ER-2012-0174 and ER-2012-0175:

Document	Filed (2012)
<i>Partial Nonunanimous Stipulation and Agreement Respecting Kansas City Water Services Department and Airport Issues</i>	October 19
<i>Non-Unanimous Stipulation and Agreement as to Certain Issues</i>	October 19
<i>Non-Unanimous Stipulation and Agreement Regarding Low-Income Weatherization and Withdrawal of Objection and Request for Hearing</i>	October 26
<i>Non-Unanimous Stipulation and Agreement Regarding Praxair, Inc., Ag Processing Inc a Cooperative and the Midwest Energy Users' Association's Objection and Withdrawal of Objection and Request for Hearing</i>	October 29

b. In File No. ER-2012-0174:

<i>Second Non-Unanimous Stipulation and Agreement as to Certain Issues</i>	November 8
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c. In File No. ER-2012-0175:

<i>Non-Unanimous Stipulation and Agreement Regarding Class Cost of Service / Rate Design</i>	October 29
<i>Second Non-Unanimous Stipulation and Agreement as to Certain Issues</i>	November 8

2. The first and second motions to strike, as described in the body of this report and order, are denied without ruling on the merits. The third motion to strike, as described in the body of this report and order, is denied.

3. The *Motion to Update Reply Brief* and *Motion to Provide Supplemental Authorities*, including the additional orders filed on December 26, 2012, are granted.

4. All other rulings described in the body of this report and order are made in, and incorporated into, this paragraph as if fully set forth; and, on those grounds, the tariff sheets listed in Appendix E are rejected.

5. No later than January 16, 2013:

- a. Kansas City Power and Light Company ("KCPL") shall file a new tariff consistent with the rulings described in this report and order ("compliance tariff") under File No. ER-2012-0174; and
- b. KCPL Greater Missouri Operations Company ("GMO") shall file a compliance tariff in File No. ER-2012-0175.

6. No later than January 24, 2013, the Commission's staff shall file a recommendation on the compliance tariffs.

7. No later than February 5, 2013, the information required under Section 393.275.1, RSMo 2000, and 4 CSR 240-10.060 shall be filed:
- a. By KCPL in File No. ER-2012-0174; and b.
 - b. By GMO in File No. ER-2012-0175
8. This order shall become effective on January 9, 2013.

Gunn, Chm., Jarrett, Kenney, and
Stoll, CC., concur;
and certify compliance with the
provisions of Section 536.080, RSMo.

Dated at Jefferson City, Missouri,
on this 9th day of January, 2013

NOTE: A Notice of Correction has been filed and is available in the official case files of the Public Service Commission

NOTE: An Order Of Clarification has been filed and is available in the official case files of the Public Service Commission

NOTE: Writ of Mandamus granted: *State ex rel., Office of the Public Counsel v. Pub. Serv. Com'n*, 409 S.W.3d 522 (Mo. App. W.D. 2013); Appeal dismissed as Moot: *In the Matter of Kansas City Power & Light Co. v. Midwest Energy Consumers Group*, 425 S.W.3d 142 (Mo. App. W.D. 2014)

Appendix A: Appearances

Party	Counsel	Counsel's Address
i. Applicants		
Kansas City Power & Light Company; and KCP&L Greater Missouri Operations Company	James M. Fischer	101 Madison Street Jefferson City, Missouri 65101
	Lisa A. Gilbreath Karl Zobrist	4520 Main, Suite 1100 Kansas City, MO 64111
	Heather A. Humphrey Roger W. Steiner	1200 Main, PO Box 418679 Kansas City, MO 64141-9679
	Charles W. Hatfield	230 W. McCarty Street Jefferson City, MO 65101-1553
ii. Parties under 4 CSR 240-2.010(10)		
Staff of the Commission	Kevin Thompson Steven Dottheim Nathan Williams Jeff Keevil Sarah Kliethermes Annette Slack Tanya Alm John Borgmeyer	P.O. Box 360 200 Madison Street, Suite 800 Jefferson City, MO 65102
Office of the Public Counsel	Lewis R. Mills, Jr. Christina Baker	200 Madison Street, Suite 650 P.O. Box 2230 Jefferson City, MO 65102
iii. Intervenor		
AARP; and Consumers Council of Missouri	John B. Coffman	871 Tuxedo Blvd. St. Louis, MO 63119-2044
AG Processing, Inc. a Cooperative and Midwest Energy Users' Group ⁹⁹	Stuart Conrad	3100 Broadway Suite 1209 Kansas City, MO 64111
City of Kansas City, Missouri	Mark W. Comley	601 MonRoE Street., Suite 301 Jefferson City, MO 65102-0537

⁹⁹ Which sometimes calls itself Midwest Energy Users' Association.

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Dogwood Energy, LLC	Carl J. Lumley	130 S. Bemiston, Ste 200 St. Louis, MO 63105
Federal Executive Agencies	Steven E. Jones	1104 SE Talonia Drive Lee's Summit, MO 64081
Midwest Energy Consumers Group	David Woodsmall	807 Winston Court Jefferson City, MO 65101
Midwest Energy Users' Association-Kansas City ¹⁰⁰	Reed J. Bartels	3100 Broadway, Suite 1209
	Jeremiah D. Finnegan	1200 Penntower Office Center 3100 Broadway Kansas City, MO 64111
Missouri Department of Natural Resources	Jessica L. Blome Mary Ann Young	221 W. High Street P.O. Box 899 Jefferson City, MO 65102
The Empire District Electric Company	Diana C. Carter	312 East Capitol P.O. Box 456 Jefferson City, MO 65102
Southern Union Company	Dean L. Cooper	312 East Capitol P.O. Box 456 Jefferson City, MO 65102
	Todd J. Jacobs	3420 Broadway Kansas City, MO 64111
Missouri Industrial Energy Consumers	Diana M. Vuylsteke John R. Kindschuh	211 N. Broadway, Suite 3600 St. Louis, MO 63102
Natural Resources Defense Council; and Sierra Club	Henry B. Robertson	705 Olive Street, Suite 614 St. Louis, MO 63101
	Thomas Cmar	5042 N. Leavitt St., Ste 1 Chicago, IL 60625
	Shannon Fisk	1617 John F. Kennedy Blvd. Suite 1675 Philadelphia, PA 19103
Earth Island Institute d/b/a Renew Missouri	Shannon Fisk	1617 John F. Kennedy Blvd Suite 1675, Philadelphia, PA 19103
Union Electric Company	James B. Lowery	111 South Ninth St. Suite 200, P.O. Box 918 Columbia, MO 65205-0918
	Thomas M. Byrne	1901 Chouteau Avenue P.O. Box 66149 (MC 1310) St. Louis, MO 63166-6149
United States Air Force-	Steven E. Jones	1104 SE Talonia Drive

¹⁰⁰ Which also sometimes calls itself Midwest Energy Users' Association.

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Whiteman AFB and other affected federal agencies		Lee's Summit, MO 64081
	Capt. Samuel T. Miller	139 Barnes Drive, Suite 1 Tyndall Air Force Base, FL 32403
United States Department of Energy and other affected federal agencies	Therese LeBlanc	2000 E. 95th St. P.O. Box 419159 Kansas City, MO 64141
	Arthur Perry Bruder	1000 Independence Ave. SW Washington, DC 20585
Missouri Joint Municipal Electrical Utility Commission	Douglas L. Healy	939 Boonville, Suite A Springfield, Missouri 65802

Senior Regulatory Law Judge: Daniel Jordan.

Appendix B: Briefs and Statements after Evidentiary Hearing

i. Initial Briefs

Party	ER-2012-0174 and ER2012-0175	
Kansas City Power & Light Company; and KCP&L Greater Missouri Operations Company	Proposed Findings of Fact and Conclusions of Law of Kansas City Power & Light Company and KCP&L Greater Missouri Operations Company; and Initial Post-Hearing Brief of Kansas City Power & Light Company and KCP&L Greater Missouri Operations Company	
Staff	Staff's Initial Brief	
Office of the Public Counsel	Initial Brief of the Office of the Public Counsel	
AARP	Initial Brief of AARP	
Consumers Council of Missouri	Initial Brief of Consumers Council of Missouri	
Federal Executive Agencies ¹⁰¹	The Federal Executive Agencies' Post-Hearing Brief on Rate of Return and Capital Structure	
Missouri Industrial Energy Consumers	Initial Brief of Missouri Industrial Energy Consumers	
	ER-2012-0174	ER-2012-0175
Midwest Energy Consumers' Group	Initial Posthearing Brief of Midwest Energy Consumers' Group (KCPL Issues)	Initial Posthearing Brief of Midwest Energy Consumers' Group (GMO Issues)
Southern Union Company	Initial Brief of Southern Union Company d/b/a Missouri Gas Energy	Initial Brief of Southern Union Company d/b/a Missouri Gas Energy
	ER-2012-0174	
Sierra Club	Brief of Sierra Club	
Midwest Energy Users' Association-Kansas City	Post-Hearing Brief Midwest Energy Users' Association	
Praxair, Inc.	Praxair, Inc. Statement in Lieu of Initial Brief	
	ER-2012-0175	
Midwest Energy Users' Group and AG Processing, Inc. a Co-Operative	Initial Brief on Limited Issues by Midwest Energy Users' Group and AG Processing, Inc. a Co-Operative	
Dogwood Energy, LLC	Proposed Findings of Fact and Conclusions of Law; and Brief	
Federal Executive Agencies ¹⁰²	The Federal Executive Agencies' Post-Hearing Brief on Transmission Tracker	

¹⁰¹ Filed by counsel for the United States Department of Energy.

¹⁰² Filed by counsel for the United States Air Force.

ii. Reply Briefs

Party	ER-2012-0174 and ER2012-0175
Kansas City Power & Light Company; and KCP&L Greater Missouri Operations Company	Reply Post-Hearing Brief of Kansas City Power & Light Company and KCP&L Greater Missouri Operations Company
Staff	Staff's Reply Brief
Office of the Public Counsel	Post-Hearing Reply Brief of the Office of the Public Counsel
Federal Executive Agencies	The Federal Executive Agencies' Reply Brief on Rate of Return and Capital Structure
Missouri Industrial Energy Consumers	Reply Brief of the Missouri Industrial Energy Consumers
Midwest Energy Consumers' Group	Reply Posthearing Brief of Midwest Energy Consumers' Group; and Proposed Findings of Fact and Conclusions of Law
Southern Union Company	Reply Brief of Southern Union Company d/b/a Missouri Gas Energy
	ER-2012-0174
Sierra Club	Reply Brief of Sierra Club
Midwest Energy Users' Association-Kansas City	Post-Hearing Reply Brief Midwest Energy Users' Association-Kansas City
	ER-2012-0175
Dogwood Energy, LLC	Dogwood Energy, LLC's Reply Brief

Appendix C: USoA Accounts for Other Regulatory Assets and Liabilities

182.3 Other regulatory assets.

A. This account shall include the amounts of regulatory-created assets, not includible in other accounts, resulting from the ratemaking actions of regulatory agencies. (See Definition No. 31.)

B. The amounts included in this account are to be established by those charges which would have been included in net income, or accumulated other comprehensive income, determinations in the current period under the general requirements of the Uniform System of Accounts but for it being probable that such items will be included in a different period(s) for purposes of developing rates that the utility is authorized to charge for its utility services. When specific identification of the particular source of a regulatory asset cannot be made, such as in plant phase-ins, rate moderation plans, or rate levelization plans, account 407.4, regulatory credits, shall be credited. The amounts recorded in this account are generally to be charged, concurrently with the recovery of the amounts in rates, to the same account that would have been charged if included in income when incurred, except all regulatory assets established through the use of account 407.4 shall be charged to account 407.3, Regulatory debits, concurrent with the recovery in rates.

C. If rate recovery of all or part of an amount included in this account is disallowed, the disallowed amount shall be charged to Account 426.5, Other Deductions, or Account 435, Extraordinary Deductions, in the year of the disallowance.

D. The records supporting the entries to this account shall be kept so that the utility can furnish full information as to the nature and amount of each regulatory asset included in this account, including justification for inclusion of such amounts in this account.

18 C.F.R. § 201

254 Other regulatory liabilities.

A. This account shall include the amounts of regulatory liabilities, not includible in other accounts, imposed on the utility by the ratemaking actions of regulatory agencies. (See Definition No. 30.)

B. The amounts included in this account are to be established by those credits which would have been included in net income, or accumulated other comprehensive income, determinations in the current period under the general requirements of the Uniform System of Accounts but for it being probable that: Such items will be included in a different period(s) for purposes of developing the rates that the utility is authorized to charge for its utility services; or refunds to customers, not provided for in other accounts, will be required. When specific identification of the particular source of the regulatory liability cannot be made or when the liability arises from revenues collected pursuant to tariffs on file at a regulatory agency, account 407.3, regulatory debits, shall be debited. The amounts recorded in this account generally are to be credited to the same account that would have been credited if included in income when earned except: All regulatory liabilities established through the use of account 407.3 shall be credited to account 407.4, regulatory credits; and in the case of refunds, a cash account or other appropriate account should be credited when the obligation is satisfied.

C. If it is later determined that the amounts recorded in this account will not be returned to customers through rates or refunds, such amounts shall be credited to Account 421, Miscellaneous Nonoperating Income, or Account 434, Extraordinary Income, as appropriate, in the year such determination is made.

D. The records supporting the entries to this account shall be so kept that the utility can furnish full information as to the nature and amount of each regulatory liability included in this account, including justification for inclusion of such amounts in this account.

18 C.F.R. § 201

Appendix D: Additional FAC Reporting

- As part of the information GMO submits when it files a tariff modification to change its FAC rate, GMO includes GMO's calculation of the interest included in the proposed rate;
- GMO maintains at GMO's corporate headquarters or at some other mutually agreed upon place within a mutually agreed upon time for review, a copy of each and every nuclear fuel, coal and transportation contract GMO has that is, or was, in effect for the previous four years;
- Within 30 days of the effective date of each and every nuclear fuel, coal and transportation contract GMO enters into, GMO provides both notice to the Staff of the contract and opportunity to review the contract at GMO's corporate headquarters or at some other mutually agreed upon place;
- GMO maintains at GMO's corporate headquarters or provides at some other mutually agreed upon place within a mutually agreed upon time, a copy for review of each and every natural gas contract GMO has that is in effect;
- Within 30 days of the effective date of each and every natural gas contract GMO enters into, GMO provides both notice to the Staff of the contract and opportunity for review of the contract at GMO's corporate headquarters or at some other mutually agreed upon place;
- GMO provides a copy of each and every GMO hedging policy that is in effect at the time the tariff changes ordered by the Commission in this rate case go into effect for Staff to retain;
- Within 30 days of any change in a GMO hedging policy, GMO provides a copy of the changed hedging policy for Staff to retain;
- GMO provides a copy of GMO's internal policy for participating in the SPP, including any GMO sales or purchases from that market that are in effect at the time the tariff changes ordered by the Commission in this rate case go into effect for Staff to retain; and
- If GMO revises any internal policy for participating in the SPP, within 30 days of that revision, GMO provides a copy of the revised policy with the revisions identified for Staff to retain.

Appendix E: Tariff Sheets Rejected

The tariff sheets rejected are:

i. In File No. ER-2012-0174, the tariff assigned tracking number YE-2012-0404:

Kansas City Power & Light Company**PSC Mo. No. 7**

11th Revised Sheet No. TOC-1, canceling 10th Revised Sheet No. TOC-1
7th Revised Sheet No. 5A, canceling 6th Revised Sheet No. 5A
7th Revised Sheet No. 5B, canceling 6th Revised Sheet No. 5B
2nd Revised Sheet No. 5C, canceling 1st Revised Sheet No. 5C
2nd Revised Sheet No. 6, canceling 1st Revised Sheet No. 6
7th Revised Sheet No. 8, canceling 6th Revised Sheet No. 8
6th Revised Sheet No. 8A, canceling 5th Revised Sheet No. 8A
7th Revised Sheet No. 9A, canceling 6th Revised Sheet No. 9A
7th Revised Sheet No. 9B, canceling 6th Revised Sheet No. 9B
2nd Revised Sheet No. 9E, canceling 1st Revised Sheet No. 9E
7th Revised Sheet No. 10A, canceling 6th Revised Sheet No. 10A
7th Revised Sheet No. 10B, canceling 6th Revised Sheet No. 10B
7th Revised Sheet No. 10C, canceling 6th Revised Sheet No. 10C
2nd Revised Sheet No. 10E, canceling 1st Revised Sheet No. 10E
7th Revised Sheet No. 11A, canceling 6th Revised Sheet No. 11A
7th Revised Sheet No. 11B, canceling 6th Revised Sheet No. 11B
7th Revised Sheet No. 11C, canceling 6th Revised Sheet No. 11C
2nd Revised Sheet No. 11E, canceling 1st Revised Sheet No. 11E
7th Revised Sheet No. 14A, canceling 6th Revised Sheet No. 14A
7th Revised Sheet No. 14B, canceling 6th Revised Sheet No. 14B
7th Revised Sheet No. 14C, canceling 6th Revised Sheet No. 14C
2nd Revised Sheet No. 14E, canceling 1st Revised Sheet No. 14E
7th Revised Sheet No. 17A, canceling 6th Revised Sheet No. 17A
3rd Revised Sheet No. 17D, canceling 2nd Revised Sheet No. 17D
7th Revised Sheet No. 18A, canceling 6th Revised Sheet No. 18A
7th Revised Sheet No. 18B, canceling 6th Revised Sheet No. 18B
7th Revised Sheet No. 18C, canceling 6th Revised Sheet No. 18C
3rd Revised Sheet No. 18E, canceling 2nd Revised Sheet No. 18E
7th Revised Sheet No. 19A, canceling 6th Revised Sheet No. 19A
7th Revised Sheet No. 19B, canceling 6th Revised Sheet No. 19B
7th Revised Sheet No. 19C, canceling 6th Revised Sheet No. 19C
3rd Revised Sheet No. 19D, canceling 2nd Revised Sheet No. 19D
7th Revised Sheet No. 20C, canceling 6th Revised Sheet No. 20C
1st Revised Sheet No. 20E, canceling Original Sheet No. 20E
2nd Revised Sheet No. 24, canceling 1st Revised Sheet No. 24
12th Revised Sheet No. 24A, canceling 11th Revised Sheet No. 24A
3rd Revised Sheet No. 25D, canceling 2nd Revised Sheet No. 25D
3rd Revised Sheet No. 26D, canceling 2nd Revised Sheet No. 26D
6th Revised Sheet No. 28B, canceling 5th Revised Sheet No. 28B
2nd Revised Sheet No. 28D, canceling 1st Revised Sheet No. 28D

2nd Revised Sheet No. 29D, canceling 1st Revised Sheet No. 29D
7th Revised Sheet No. 30, canceling 6th Revised Sheet No. 30
1st Revised Sheet No. 30A, canceling Original Sheet No. 30A
7th Revised Sheet No. 33, canceling 6th Revised Sheet No. 33
3rd Revised Sheet No. 33B, canceling 2nd Revised Sheet No. 33B
7th Revised Sheet No. 35, canceling 6th Revised Sheet No. 35
7th Revised Sheet No. 35A, canceling 6th Revised Sheet No. 35A
7th Revised Sheet No. 35B, canceling 6th Revised Sheet No. 35B
7th Revised Sheet No. 35C, canceling 6th Revised Sheet No. 35C
7th Revised Sheet No. 36, canceling 6th Revised Sheet No. 36
7th Revised Sheet No. 36A, canceling 6th Revised Sheet No. 36A
7th Revised Sheet No. 36B, canceling 6th Revised Sheet No. 36B
7th Revised Sheet No. 37, canceling 6th Revised Sheet No. 37
7th Revised Sheet No. 37A, canceling 6th Revised Sheet No. 37A
7th Revised Sheet No. 37B, canceling 6th Revised Sheet No. 37B
7th Revised Sheet No. 37C, canceling 6th Revised Sheet No. 37C
7th Revised Sheet No. 37D, canceling 6th Revised Sheet No. 37D
7th Revised Sheet No. 37E, canceling 6th Revised Sheet No. 37E
7th Revised Sheet No. 37F, canceling 6th Revised Sheet No. 37F
7th Revised Sheet No. 37G, canceling 6th Revised Sheet No. 37G
7th Revised Sheet No. 45, canceling 6th Revised Sheet No. 45
7th Revised Sheet No. 45A, canceling 6th Revised Sheet No. 45A
1st Revised Sheet No. 43Z, canceling Original Sheet No. 43Z
1st Revised Sheet No. 43Z.1, canceling Original Sheet No. 43Z.1
1st Revised Sheet No. 43Z.2, canceling Original Sheet No. 43Z.2
1st Revised Sheet No. 43Z.3, canceling Original Sheet No. 43Z.3
1st Revised Sheet No. 43AQ, canceling Original Sheet No. 43AQ
1st Revised Sheet No. 50, canceling Original Sheet No. 50.

ii. In File No. ER-2012-0175, the tariff assigned tracking number YE-2012-0405.

KCP&L Greater Missouri Operations Company
PSC Mo. No. 1, Electric Rates

5th Revised Sheet No. 1, canceling 4th Revised Sheet No. 1
6th Revised Sheet No. 18, canceling 5th Revised Sheet No. 18
6th Revised Sheet No. 19, canceling 5th Revised Sheet No. 19
6th Revised Sheet No. 21, canceling 5th Revised Sheet No. 21
6th Revised Sheet No. 22, canceling 5th Revised Sheet No. 22
6th Revised Sheet No. 23, canceling 5th Revised Sheet No. 23
6th Revised Sheet No. 24, canceling 5th Revised Sheet No. 24
6th Revised Sheet No. 25, canceling 5th Revised Sheet No. 25
6th Revised Sheet No. 28, canceling 5th Revised Sheet No. 28
6th Revised Sheet No. 29, canceling 5th Revised Sheet No. 29
6th Revised Sheet No. 31, canceling 5th Revised Sheet No. 31

6th Revised Sheet No. 34, canceling 5th Revised Sheet No. 34
6th Revised Sheet No. 35, canceling 5th Revised Sheet No. 35
6th Revised Sheet No. 41, canceling 5th Revised Sheet No. 41
6th Revised Sheet No. 42, canceling 5th Revised Sheet No. 42
6th Revised Sheet No. 43, canceling 5th Revised Sheet No. 43
6th Revised Sheet No. 44, canceling 5th Revised Sheet No. 44
6th Revised Sheet No. 47, canceling 5th Revised Sheet No. 47
6th Revised Sheet No. 48, canceling 5th Revised Sheet No. 48
6th Revised Sheet No. 50, canceling 5th Revised Sheet No. 50
5th Revised Sheet No. 51, canceling 4th Revised Sheet No. 51
5th Revised Sheet No. 52, canceling 4th Revised Sheet No. 52
5th Revised Sheet No. 53, canceling 4th Revised Sheet No. 53
5th Revised Sheet No. 54, canceling 4th Revised Sheet No. 54
5th Revised Sheet No. 56, canceling 4th Revised Sheet No. 56
5th Revised Sheet No. 57, canceling 4th Revised Sheet No. 57
6th Revised Sheet No. 60, canceling 5th Revised Sheet No. 60
6th Revised Sheet No. 61, canceling 5th Revised Sheet No. 61
5th Revised Sheet No. 66, canceling 4th Revised Sheet No. 66
5th Revised Sheet No. 67, canceling 4th Revised Sheet No. 67
5th Revised Sheet No. 68, canceling 4th Revised Sheet No. 68
5th Revised Sheet No. 70, canceling 4th Revised Sheet No. 70
5th Revised Sheet No. 71, canceling 4th Revised Sheet No. 71
5th Revised Sheet No. 74, canceling 4th Revised Sheet No. 74
5th Revised Sheet No. 76, canceling 4th Revised Sheet No. 76
5th Revised Sheet No. 79, canceling 4th Revised Sheet No. 79
5th Revised Sheet No. 80, canceling 4th Revised Sheet No. 80
6th Revised Sheet No. 88, canceling 5th Revised Sheet No. 88
6th Revised Sheet No. 89, canceling 5th Revised Sheet No. 89
5th Revised Sheet No. 90, canceling 4th Revised Sheet No. 90
6th Revised Sheet No. 91, canceling 5th Revised Sheet No. 91
6th Revised Sheet No. 92, canceling 5th Revised Sheet No. 92
4th Revised Sheet No. 93, canceling 3rd Revised Sheet No. 93
6th Revised Sheet No. 95, canceling 5th Revised Sheet No. 95
5th Revised Sheet No. 103, canceling 4th Revised Sheet No. 103
5th Revised Sheet No. 104, canceling 4th Revised Sheet No. 104
1st Revised Sheet No. 127.6, canceling Original Sheet No. 127.6
1st Revised Sheet No. 127.7, canceling Original Sheet No. 127.7
1st Revised Sheet No. 127.8, canceling Original Sheet No. 127.8
1st Revised Sheet No. 127.9, canceling Original Sheet No. 127.9
Original Sheet No. 127.11
Original Sheet No. 127.12
Original Sheet No. 127.13
Original Sheet No. 127.14
Original Sheet No. 127.15
1st Revised Sheet No. 143, canceling Original Sheet No. 143

KCP&L Greater Missouri Operations Company
PSC Mo. No. 1, Electric Rules and Regulations

1st Revised Sheet No. 62.15, canceling Original Sheet No. 62.15

1st Revised Sheet No. 62.16, canceling Original Sheet No. 62.16

1st Revised Sheet No. 62.17, canceling Original Sheet No. 62.17

1st Revised Sheet No. 62.18, canceling Original Sheet No. 62.18.

In the Matter of the Joint Application of Missouri-American Water Company and Meramec Sewer Co. for Authority for Missouri-American Water Company to Acquire Certain Assets of Meramec Sewer Co. and, in Connection Therewith, Certain Other Related Transactions

File No. SO-2013-0260

SEWER

- §4. Transfer, lease and sale**
- §21. Accounting**
- §25. Reports, records and statements**
- §29. Billing practices**

Conditions on which the Commission approved the merger of sewer companies included standards for reporting depreciation and payment of the acquired company's debt, recordkeeping standards, and training of service representatives.

**ORDER APPROVING APPLICATION AND ORDER
GRANTING MOTION FOR EXPEDITED TREATMENT**

Issue Date: February 20, 2013

Effective Date: February 28, 2013

Syllabus: This order approves the joint application of Missouri-American Water Company ("MAWC") and Meramec Sewer Co. ("Meramec Sewer") for Meramec Sewer to sell its sewer system to MAWC.

Procedural History

On November 2, 2012, Meramec Sewer and MAWC filed a joint application. That application requests, among other things, authority from the Commission for Meramec Sewer to sell its sewer system to MAWC. Meramec Sewer and MAWC entered into an agreement on September 15, 2011, in which MAWC agreed to purchase Meramec Sewer's sewer system.

The Commission issued notice of this application on November 6, 2012. In that notice, the Commission allowed anyone who wished to intervene until November 26, 2012 to request intervention. The Commission received no intervention requests.

Staff filed its Recommendation on January 28, 2013. Staff recommended that the Commission approve the transaction, with certain conditions. Meramec Sewer and MAWC replied on February 6, 2013, asking for clarification of Staff's Recommendation, but largely also accepting Staff's Recommendation and conditions.

On February 12, 2013, MAWC filed a motion for expedited treatment. MAWC asks the Commission to make the order approving the application effective no later than February 28, 2013 for billing purposes. Staff supports MAWC's motion.

Discussion

The application is within the Commission's jurisdiction to decide.¹ Because no party objects to the application, no evidentiary hearing is required.² Thus, the Commission deems the hearing waived,³ and bases its findings on the verified filings, and makes its conclusions as follows.

¹ Section 393.190 RSMo 2000.

² *State ex rel. Rex Deffenderfer Ent., Inc. v. Public Serv. Com'n*, 776 S.W.2d 494 (Mo. App. 1989).

³ Section 536.060, RSMo 2000.

The Commission issued Meramec Sewer a certificate of convenience and necessity to provide sewer service in File No. SA-77-167. Meramec Sewer currently provides sewer service to approximately 1,005 customers in Jefferson County, Missouri. MAWC is a regulated water and sewer company serving more than 450,000 customers throughout Missouri.

The Commission may approve of a sale of a sewer company if that sale is not detrimental to the public interest.⁴ Based on the verified pleadings, the Commission finds that granting the application for the sale of the sewer company would not be detrimental to the public interest.

The application will be granted, and the motion for expedited treatment is granted.

THE COMMISSION ORDERS THAT:

1. The Joint Application is granted.
2. The Motion for Expedited Treatment is granted.
3. The Commission authorizes Meramec Sewer Company to sell and transfer its sewer utility assets to Missouri-American Water Company; authorizes Missouri-American Water Company to acquire Meramec Sewer Co.'s sewer utility assets; and grants Missouri-American Water Company the certificate of convenience and necessity presently held by Meramec Sewer Company to provide sewer service within the authorized service area.
4. Missouri-American Water Company shall notify the Commission when it has closed on the Meramec Sewer Co. assets within 5 business days after such closing has occurred. If closing has not occurred within 30 days after the effective date of the order approving this application, Missouri-American Water Company is required to file a status report on the status of the sale within 5 days after such 30 day period, and every 30 days thereafter, until the closing has occurred.
5. Missouri-American Water Company shall, within 10 days after closing, file a tariff adoption notice for the existing Meramec Sewer Co. tariff as a 30-day tariff filing. MAWC is authorized to provide service under the Meramec Sewer Co. tariff on an interim bases after closing on the assets but before the adopted tariff sheets take effect.
6. Missouri-American Water Company shall record a value of the amount listed in the Highly Confidential version of the Staff Memorandum listed on page 7, paragraph 4, for the amount of the Meramec Sewer Company acquisition plant in service, net of accumulated depreciation and CIAC, at January 31, 2013, as described within the Memorandum, and Missouri-American Water Company shall not seek recovery of an acquisition premium as a result of the transaction in any future proceeding before the Commission.
7. Missouri-American Water Company is required to assist Meramec Sewer Company in the preparation and filing of Meramec Sewer Company's 2012 PSC Annual Report by the due date, April 15, 2013.
8. Missouri-American Water Company is required to provide notice in writing to the Staff within 10 days of paying in full all outstanding amounts owed to MDNR for permit fees and to Jefferson County for past due real estate taxes.

⁴ See Commission Rule 4 CSR 240-3.310(1)(D).

9. Missouri-American Water Company shall adopt the depreciation schedules presently approved for Meramec Sewer Co. for Meramec Sewer Co.'s existing sewer service areas, as shown in Attachment A.

10. Missouri-American Water Company shall calculate and record depreciation expense on a going-forward basis after closing, using the above-mentioned depreciation schedule.

11. Missouri-American Water Company shall maintain utility plant records and customer account records, and shall keep all books and records, including plant property records, in accordance with the NARUC Uniforms System of Accounts, as described in Staff's Memorandum.

12. Missouri-American Water Company shall submit in this file an executed copy of the wholesale agreement between MAWC and the Northeast Public Sewer District within 5 days after the closing of this transaction.

13. Missouri-American Water Company shall provide adequate training to all customer service representatives with respect to adopted Meramec Sewer Co. rates and rules prior to the Meramec Sewer Co. customers receiving their first bill that includes sewer billing from Missouri-American Water Company.

14. Missouri-American Water Company shall provide the EMSU Staff with a sample of 45 combined water and sewer billing statements issued by Missouri-American Water Company to the Meramec Sewer Co. service district customers from its first month after closing and within 10 days of issuance of those bills.

15. The Commission makes no finding that would preclude the Commission from considering the ratemaking treatment to be afforded any matters pertaining to the granting of the certificate, including future expenditures by Missouri-American Water Company, in any later proceeding.

16. This order shall become effective on February 28, 2013.

17. This case shall be closed on March 1, 2013.

Gunn, Chm., Jarrett, R. Kenney,
Stoll, and W. Kenney, CC., concur.

Pridgin, Senior Regulatory Law Judge

Ag Processing, Inc., a Cooperative, Complainant, v. KCP&L Greater Missouri Operations Company, Respondent.

File No. HC-2010-0235

AG Processing, Inc., Complainant, v. KCP&L Greater Missouri Operations Company, Respondent.

File No. HC-2012-0259

EXPENSE

§11. Gas

§57. Purchases under contract

GAS

§74. Purchases under contract

An action filed as a complaint was really a prudence review, in which a showing of serious doubt as to the prudence of an expenditure places the burden of proving the prudence of that expenditure on the utility.

ORDER REGARDING REMAND

Issue Date: February 27, 2013

Effective Date: March 5, 2013

Background on file No. HC-2010-0235

Prior to the merger between Great Plains Energy Incorporated and Aquila, Inc. d/b/a Aquila Networks – L&P (“Aquila”), which then became KCP&L Greater Missouri Operations Company (“GMO”), a sister subsidiary of Kansas City Power and Light Company, Aquila had a program in place to hedge natural gas price volatility for its steam operations.¹ Aquila engaged in this program because they used two fuels to generate steam – coal was the primary fuel and natural gas was used as a swing fuel when load exceeded the capacity of the coal-fired boiler. Natural gas prices were highly volatile, in part, because of the effects of Hurricanes Rita and Katrina in 2005. The hedging program was a 1/3rd, 1/3rd, 1/3rd program. Thus, 1/3rd of the required natural gas was not hedged and was to be bought on the spot market; 1/3rd was hedged with futures contracts and 1/3rd was hedged with call options. In 2006-2007, the hedging program resulted in losses because the amount of natural gas was over-hedged based upon forecasts for usage from Aquila’s customers and because the price of gas fell.

Aquila has five industrial steam customers: AG Processing, Inc. (“AGP”), Triumph Foods, L.L.C. (a new customer coming on line just before the 2006 hedges were placed), Albaugh Chemical, Nestle/Purina PetCare, and Land O’ Lakes - Omnium Division (a chemical company). A sixth customer, Silgan Containers, left the system towards the end of 2006, apparently after the 2006 hedges were placed. Gains and losses from the hedging program were passed through to Aquila’s customers by means of Quarterly Cost Adjustments (“QCA”) for fuel expenses. The pass through is an 80/20 adjustment where the customers pick up 80% of the fuel costs. The QCA is similar to a fuel adjustment clause mechanism.

¹ The merger was approved by the Commission in File No. EM-2007-0374, *In the Matter of the Joint Application of Great Plains Energy Incorporated, Kansas City Power & Light Company, and Aquila, Inc. for Approval of the Merger of Aquila, Inc. with a Subsidiary of Great Plains Energy Incorporated and for Other Related Relief* in its Report and Order issued on July 1, 2008, Effective, July 11, 2008.

During the period of April 2006 through December 2007, Aquila purchased hedge positions for approximately 2,000,000 mmBtus of natural gas for steam production. During the same period, its actual burn was 1,500,000 mmBtus. The net cost of the hedging program for 2006 was \$1,164,960 and for 2007 was \$2,441,861. Consequently, with the 80% pass through, Aquila's customers paid \$936,968 of these costs for 2006, and \$1,953,488 for 2007. The hedging program ceased in October of 2007.

On January 28, 2010, AGP filed its complaint in File No. HC-2010-0235 claiming that GMO was imprudent for initiating such a hedging program and that the program was imprudently designed and imprudently managed or operated. AGP sought a refund of the money lost in the hedging program.

The Commission issued its Report and Order in HC-2010-0235 on September 28, 2011, effective October 8, 2011. In that order, the Commission determined that: (1) it was not imprudent for GMO to adopt a natural gas hedging program; (2) GMO's hedging program was prudently designed,

but

- (3) GMO failed to meet its burden to prove that it operated its hedging program in a prudent manner.

When reaching its decision that GMO failed to meet its burden to prove that it operated its hedging program in a prudent manner, the Commission examined the presumption of prudence the utility receives in relation to its expenses. That presumption is applied as follows in a general rate case:

A utility's expenditures are presumed to be prudently incurred, but, if some other participant in the proceeding creates a serious doubt² as to the prudence of the expenditure, then the utility has the burden of dispelling those doubts and proving the questioned expenditure to have been prudent.³

Applying the presumption, the Commission determined that:

- (1) AGP had raised serious doubt about the prudence of GMO's decisions regarding the hedging program;
- (2) GMO had the burden of proving it operated its hedging program in a prudent manner;
- and
- (3) GMO failed to meet that burden.

The Commission went on to say that GMO failed to establish that any part of the cost of operating the hedging program was prudently incurred and the entire net cost of operating its natural gas price hedging program for steam production in 2006 and 2007 was imprudently incurred.

The Commission made another important decision in HC-2010-0235. The Commission decided that since this action was a full prudence review, it applied to all of GMO's steam customers, and the relief ordered by the Commission, a refund, should apply to all of Aquila's steam customers, not just AGP, the only party that complained.

² The legal standard for overcoming a presumption is the production of substantial controverting evidence. It should be noted that in HC-2010-0235 the Commission did not articulate this standard when finding that AGP raised serious doubt so that finding is not adequately supported. On remand this won't necessarily matter, because the Court of Appeals made it clear that the Complainant, AGP, has the burden of proof at the preponderance of the evidence standard. The burden-shifting presumption is not applicable.

³ This presumption is routinely applied in rate cases, but it should be kept in mind that legal presumptions are not the same as a burden of proof. A full legal analysis of the burden of proof in a "prudence review" versus a complaint case appears in the Report and Order in File No. EO-2011-0390 that was issued on September 4, 2012.

GMO pursued an appeal of the Commission's decision to the Missouri Court of Appeals, Western District. By November 12, 2012, while awaiting the issuance of the mandate of the Court of Appeals, GMO had completed the Commission-ordered refund of the entire amount at issue to its customers through the QCA.

The Court of Appeals reversed the Commission's decision, finding that the Commission incorrectly applied the burden of proof. The Court determined that AGP, as the complainant who initiated the action, had the burden to prove its claims of imprudence regarding the company's expenditures on the natural gas hedging program at the preponderance of the evidence standard. The court stated: "Granting relief without requiring Ag Processing to prove the allegations in its complaint is reversible error." "Accordingly, we reverse the order and remand the cause for further consideration under the appropriate burden of proof."

The Court of Appeals Mandate was issued on November 21, 2012, making its order final. The Court had overruled motions for rehearing filed by the Commission and AGP. No motions for transfer to the Supreme Court of Missouri were filed.

Background on file No. HC-2010-0235

File Number HC-2012-0259 is another complaint initiated by AGP against GMO raising allegations of imprudence with GMO's hedging program, but it involves a different quarterly cost adjustment period - 2009. It also involves different allegations of imprudence. This case was nearing its hearing date when GMO filed a motion to stay it pending the Court of Appeals decision in HC-2010-0235. The Commission granted that motion and stayed the case because the proper burden of proof will be identical for both of these cases.

The Commission's Review Following Remand

After discussing these two matters at the Commission's December 5, 2012 Agenda session, the Commission decided the initial step was to have the parties to HC-2010-0235 re-brief that case, based on the present record, applying the preponderance of the evidence standard. Those briefs were filed on January 7, 2013. GMO responded to AGP's brief on January 15, 2013. AGP replied to GMO's response on January 25, 2013. In that reply, AGP raised another argument claiming that even if it failed to meet the burden of proof, the customers cannot be compelled to refund the money to GMO as a matter of law. The Commission set a response deadline for February 4, 2013 to give the parties an opportunity to respond to this new legal argument. Responses were filed by GMO on February 8, 2013, and by the Commission's Staff on February 11, 2013.

On February 12, 2013, AGP filed a notice of its intent to reply to GMO's and Staff's responses. And on February 13, 2013, following a case discussion on these matters at the Commission's Agenda session, the Commission established a response deadline for AGP of March 19, 2013.⁴

Following the re-briefing of HC-2010-0235, the Commission undertook an extensive review of its September 28, 2011 Report and Order. When reviewing its prior decision, the Commission kept in mind the preponderance of the evidence standard, the prudence standard and the proof of harm standard as articulated below.

⁴ Responses were filed by both AGP and GMO. Neither response adds to the analysis.

Preponderance of the Evidence Standard

In order to meet the preponderance of the evidence standard, AGP must convince the Commission it is “more likely than not” that its allegations of imprudence against Aquila/GMO are true.⁵ There must be enough evidence to tip the scales in favor of a party in order for them to meet this burden. The preponderance of the evidence must support the complainant’s allegations and demonstrate that GMO violated the prudence standard in relation to the company’s hedging program.

If the evidence is equally balanced, the litigant having the burden of proof loses.⁶

Similarly, a submissible case is not made if it depends solely on evidence which equally supports two inconsistent and contradictory inferences.⁷

Prudence Standard

The “prudence standard” further qualifies how AGP must meet its burden of proof in relation to its allegations. To determine if GMO’s conduct was imprudent, the Commission looks at whether the utility’s conduct was reasonable at the time, under all of the circumstances, considering that the company had to solve its problem **prospectively** rather than in reliance on hindsight.⁸ More specifically, AGP must prove, by the preponderance of the evidence, that GMO’s conduct was unreasonable at the time, under all of the circumstances, from a prospective viewpoint, not in hindsight. Additionally, “[i]f the company has exercised prudence in reaching a decision, the fact that external factors outside the company’s control later produce an adverse result do not make the decision extravagant or imprudent.”⁹

Proof of Harm

In order for the Commission to direct a refund for any alleged imprudently incurred costs, it must apply a two-part test. The Commission must find both that: (1) the utility acted imprudently when incurring those costs and, (2) such imprudence resulted in harm to the utility’s ratepayers.¹⁰ Harm to ratepayers in relation to imprudently incurred costs requires proof of causation, i.e., that the increased costs recovered from the ratepayers were causally related to the alleged imprudent action, and evidence as to the amount those expenditures would have been if the utility acted prudently.¹¹

⁵ *Byous v. Missouri Local Government Employees Retirement System Bd. of Trustees*, 157 S.W.3d 740, 746 (Mo. App. 2005); *Holt v. Director of Revenue, State of Mo.*, 3 S.W.3d 427, 430 (Mo. App. 1999); *McNear v. Rhoades*, 992 S.W.2d 877, 885 (Mo. App. 1999); *Rodriguez*, 936 S.W.2d at 109 -111; *Wollen v. DePaul Health Center*, 828 S.W.2d 681, 685 (Mo. banc 1992).

⁶ *Dill v. Dill*, 304 S.W.3d 738, 743 (Mo. App. 2010).

⁷ *Steward v. Baywood Villages Condominium Ass’n* 134 S.W.3d 679, 682 (Mo. App. 2004).

⁸ *State ex rel. GS Technologies Operating Co., Inc. v. Public Service Comm’n*, 116 S.W.3d 680, 694 (Mo. App. 2003); *State ex rel. Associated Natural Gas Co. v. Public Service Comm’n*, 954 S.W.2d 520, 528 -529 (Mo. App. 1997).

⁹ *State ex rel. Missouri Power and Light Co. v. Public Service Comm’n*, 669 S.W.2d 941, 947 -948 (Mo. App. 1984).

¹⁰ *State ex rel. Associated Natural Gas Co. v. Public Service Comm’n*, 954 S.W.2d 520, 529 -530 (Mo. App. 1997).

¹¹ *Id.*

Analysis and Decision

After a complete review of the evidence in HC-2010-0235, the Commission determines that it will vacate its Report and Order in its entirety as a matter of due process. When AGP presented its case to the Commission it was operating under the assumption that the burden of proof would shift to GMO if it raised serious doubt as to GMO's adoption and management of the hedging program. To ensure due process, the Commission will reopen the evidentiary record in HC-2010-0235 to take **additional** evidence¹² with all of the parties being fully informed of the proper burden of proof and who bears that burden.¹³ AGP bears the burden of proof of its allegations at the preponderance of the evidence standard. All of the parties will be afforded the opportunity to present evidence so there will be no unfair advantage to any party.

Additionally, the Commission failed to properly apply the proof of harm standard. The Commission even noted this in its decision stating: "The record is not clear about how much net hedging costs Aquila would have incurred if it had properly forecast the amount of natural gas it need to purchase supply steam to its customers." There was no evidence produced as to what the hedging costs might have been if more accurate forecasted load had been used, but presumably there still would have been costs passed through the customers. There was also no evidence produced providing a breakdown of each customer's portion of the hedging costs. Consequently, when the Commission ordered the refund in HC-2010-0235, it did not have any evidence in the record to determine the correct amount of the award.

Current Status of the Quarterly Cost Adjustment

Having determined the Commission must reopen the record in HC-2010-0235, and having determined that its prior decision was in error because it did not apply the proper burden of proof, the Commission must make a determination with regard to the refund the Commission ordered to GMO's customers. The Commission must make this ruling now pursuant to Section 386.520.2(3), RSMo Supp. 2011, which provides:

2. With respect to orders or decisions issued on and after July 1, 2011, that involve the establishment of new rates or charges for public utilities that are not classified as price-cap or competitive companies, there shall be no stay or suspension of the commission's order or decision, however:

¹² The parties do not have to re-introduce evidence already admitted into the record.

¹³ As the Court of Appeals has elucidated:

The trial court is afforded wide discretion in determining whether to reopen a case to allow the admission of additional evidence. The trial court's decision as to whether to reopen a case will be reversed only upon a showing of abuse of discretion. However, when there is no inconvenience to the Court or unfair advantage to one of the parties, there is an abuse of discretion and a new trial will be directed upon a refusal to reopen a case and permit the introduction of material evidence, that is evidence that would substantially affect the merits of the action and perhaps alter the Court's decision. (Internal citations omitted).

Foster v. Village of Brownington, 76 S.W.3d 281, 287 (Mo. App. W.D. 2002).

Because the Court of Appeals has reversed and remanded this case to the Commission, the Commission believes that it has the same discretionary authority as the courts to re-open the evidentiary record.

(3) If the effect of the unlawful or unreasonable commission decision was to increase the public utility's rates and charges by a lesser amount than what the public utility would have received had the commission not erred or to decrease the public utility's rates and charges in a greater amount than would have occurred had the commission not erred, then the commission shall be instructed on remand to approve temporary rate adjustments designed to allow the public utility to recover from its then-existing customers the amounts it should have collected plus interest at the higher of the prime bank lending rate minus two percentage points or zero. Such amounts shall be calculated for the period commencing with the date the rate increase or decrease took effect until the earlier of the date when new permanent rates and charges consistent with the court's opinion became effective or when new permanent rates or charges otherwise approved by the commission as a result of a general rate case filing or complaint became effective. Such amounts shall then be reflected as a rate adjustment over a like period of time. **The commission shall issue its order on remand within sixty days unless the commission determines that additional time is necessary to properly calculate the temporary or any prospective rate adjustment, in which case the commission shall issue its order within one hundred twenty days.** (Emphasis added).

The Commission determines that additional time, beyond 60 days, is necessary to properly calculate the temporary rate adjustment that must be made in relation to its September 28, 2011 Report and Order determined to be unlawful by the Court of Appeals. It required more than 60 days to allow the parties to re-brief the matter and allow the Commission to fully review the evidentiary record applying the proper burden of proof.

Even though the Commission has decided that the record must be reopened, Section 386.520.2(3) RSMo Supp. 2011, mandates the Commission to make a determination on rate adjustments within a maximum deadline of 120 days upon remand. Because the Court of Appeals' mandate issued on November 21, 2012, the Commission must make this adjustment no later than March 21, 2013. There is insufficient time for the Commission to conduct a new hearing in this matter and render a new decision within that time frame, so the Commission will order a rate adjustment during the pendency of the new hearing. This rate adjustment will not prejudice any party because the QCA is a two-way cost adjustment mechanism.¹⁴ If it is later determined that GMO actions were imprudent, any amounts returned to GMO that should have been retained by the customers can simply be flowed back through the QCA to the customers.

¹⁴ The Commission has reviewed all of the parties' filings in relation to this issue and agrees with the positions of its Staff and GMO, as articulated fully in their filings. See EFIS Docket Entry No. 120, Legal Analysis of KCP&L Greater Missouri Operations Company, filed on February 8, 2013 and EFIS Docket Entry No. 121, Response to Order Directing Filing, filed on February 11, 2013. EFIS is the Commission's electronic Information and Filing System. The Commission adopts these legal analyses as if fully set out in this order.

Consolidation with HC-2012-0259

File No. HC-20120-0259 has been stayed pending a determination in HC-2010-0235. Because the Commission is going to reopen the record in HC-2010-0235, as a matter of administrative economy and to prevent unnecessary delay and avoid unnecessary costs, the Commission will consolidate the two actions. While the allegations in the two complaints advance different theories of imprudence, they involve related questions of law and fact.¹⁵

Procedural Schedule

The parties will need to coordinate the presentation of the evidence for these two matters and the Commission is unaware of potential conflict dates for counsel to the parties. Consequently, the Commission will direct the joint filing of a proposed procedural schedule.

THE COMMISSION ORDERS THAT:

1. The Commission's September 28, 2011 Report and Order in HC-2010-0235 is vacated.
2. The Commission re-opens the evidentiary record in HC-2010-0235 for further proceedings as delineated in the body of this order.
3. KCP&L Greater Missouri Operations Company shall, within 20 days of the effective date of this order, file a new Quarterly Cost Adjustment Tariff that initiates the return of the improvidently ordered refund to its steam customers in the manner described in Section 386.520.2(3), RSMo Supp. 2011, which states: "Such amounts shall be calculated for the period commencing with the date the rate increase or decrease took effect until the earlier of the date when new permanent rates and charges consistent with the court's opinion became effective or when new permanent rates or charges otherwise approved by the commission as a result of a general rate case filing or complaint became effective. Such amounts shall then be reflected as a rate adjustment over a like period of time." The Commission's Staff shall review the company's tariff filing to ensure statutory compliance and file a recommendation on whether to approve it as being in conformity with this order no later than five days after the tariff filing is made.
4. The Commission lifts the stay and reactivates File Number HC-2012-0259.
5. File Numbers HC-2010-0235 and HC-2012-0259 are consolidated. File No. HC-2012-0259 shall be designated as the lead case and File No. HC-2010-0235 shall be closed. All future filings in these matters shall be made in File NO. HC-2012-0259.
6. No later than March 14, 2013, the parties shall jointly file a proposed procedural schedule for the consolidated cases.
7. This order shall become effective on March 5, 2013.

Gunn, Chm., Jarrett, R. Kenney,
Stoll, and W. Kenney, CC., concur.
Stearley, Deputy Chief Regulatory Law Judge

NOTE: Appeal dismissed: *AG Processing, Inc. v. KCP&L Greater Missouri Operations Co.*, 432 S.W. 3d 226(Mo. App. W.D. 2014)

¹⁵ See Commission rule 4 CSR 240-2.110(3).

In the Matter of The Empire District Electric Company of Joplin, Missouri Tariffs Increasing Rates for Electric Service Provided to Customers in the Missouri Service Area of the Company

File No. ER-2012-0345
YE-2013-0020

EVIDENCE, PRACTICE AND PROCEDURE

§30. Settlement procedures

Parties may waive any procedure otherwise required before decision and, when a settlement disposes of an action, the Commission need not separately state its findings of fact.

ORDER APPROVING STIPULATION AND AGREEMENT

Issue Date: February 27, 2013

Effective Date: March 6, 2013

Procedural History

On July 6, 2012, The Empire District Electric Company ("Empire") submitted a tariff with the Missouri Public Service Commission ("Commission") designed to implement a general rate increase for electric service. In its filing, Empire requested an overall increase in its Missouri retail electric rates of \$30.7 million, exclusive of applicable fees or taxes, which constitutes an increase of approximately 7.6%. The Commission suspended the effective date of that general rate increase tariff until June 3, 2013. On July 23, 2012, the Commission granted the applications to intervene as parties of the Missouri Department of Natural Resources ("MDNR"), Southern Union Company d/b/a Missouri Gas Energy ("MGE"), and the Midwest Energy Users' Association ("MEUA")¹. The Midwest Energy Consumers Group ("MECG")² was granted intervention on August 3, 2012. By order issued on August 6, 2012, the Commission set a procedural schedule leading to an evidentiary hearing. That order also established the test year for this case as the twelve month period ending March 31, 2012, updated for known and measureable changes through June 30, 2012, with a true-up period through December 31, 2012.

Empire also filed a separate tariff (YE-2013-0021) to increase Empire's gross annual electric revenues on an interim basis by approximately \$6.2 million, subject to refund. The interim tariff proposed to increase each base rate or charge for electric service by 1.53 percent. On July 23, 2012, the Commission suspended the interim rate tariff in order to allow Empire an opportunity to present evidence to show that it should be granted an interim rate increase. The Commission held an evidentiary hearing on September 10, 2012 to address the issue of whether it was appropriate under the circumstances to grant Empire's request for interim rate relief. On October 31, 2012, the Commission issued a *Report and Order Regarding Interim Rates*, which rejected the tariff that would implement the interim rate increase and denied Empire's interim rate request.

¹ MEUA is an unincorporated association consisting of the following members: Explorer Pipeline Company, Enbridge Pipelines (Ozark), LLC, and Praxair, Inc.

² MECG is an unincorporated association consisting of the following members: Wal-Mart Stores East, L.P., Sam's East, Inc., Tyson Foods, and Tamko Building Products, Inc.

On January 3-4, 2013, the Commission conducted two local public hearings in Joplin, Missouri, and one local public hearing in Reeds Spring, Missouri. At those hearings, the Commission received testimony from Empire's customers and the public regarding the request for a rate increase.

On February 15, 2013, the procedural schedule was suspended at the parties' request, and on February 22, 2013, several of the parties filed a *Nonunanimous Stipulation and Agreement* ("Agreement") purporting to resolve all issues in this matter. The signatory parties include Empire, the Commission's Staff, the Office of the Public Counsel, MDNR, MEGC, and MEUA. The remaining party, MGE, did not sign the Agreement.

The Commission held an on-the-record proceeding on February 25, 2013 to direct questions to the parties regarding the Agreement. While the Agreement is not unanimous, MGE stated at the on-the-record proceeding that it did not oppose the Agreement and did not intend to request a hearing.³ Therefore, the Commission will treat the Agreement as unanimous.

The Agreement

The Agreement waives procedural requirements that would otherwise be necessary before final decision.⁴ Since the settlement disposes of this action, the Commission need not separately state its findings of fact.⁵ The parties expressly ask for an order approving all of the specific terms and conditions of the Agreement.

The Agreement's terms include an increase to Empire's Missouri jurisdictional gross annual electric revenues in the approximate amount of \$27,500,000, exclusive of any applicable license, occupation, franchise, gross receipts taxes, or similar fees or taxes. The Agreement also includes specimen tariff sheets and appendices, which include provisions for rate design, specific assumptions underlying the Agreement and depreciation rates.

The parties further state that Empire will file tariff sheets no later than February 28, 2013 in compliance with the specimen tariff sheets, and that those tariff sheets will become effective on April 1, 2013.

Ratemaking Standards

The standard for rates is "just and reasonable,"⁶ a standard founded on constitutional provisions, as the United States Supreme Court has explained:

Rates which are not sufficient to yield a reasonable return on the value of the property used at the time it is being used to render the services are unjust, unreasonable and confiscatory, and their enforcement deprives the public utility company of its property in violation of the Fourteenth Amendment.⁷

³ Commission Rule 4 CSR 240-2.115 provides that the Commission may consider a non-unanimous stipulation to be unanimous if no party files an objection within seven days of the filing of the agreement. While seven days have not passed since the filing of the Agreement, MGE stated that it waived the seven day requirement.

⁴ Section 536.060, RSMo 2000.

⁵ Section 536.090, RSMo 2000.

⁶ *Id.* and Section 393.150.2, RSMo 2000.

⁷ *Bluefield Water Works & Improvement Co. v. Public Serv. Com'n of the State of West Virginia*, 262 U.S. 679, 690 (1923).

But the Commission must also consider the customers:

The rate-making process . . . i.e., the fixing of 'just and reasonable' rates, involves a balancing of the investor and the consumer interests.⁸

Further, that balancing has no single formula:

The Constitution does not bind rate-making bodies to the service of any single formula or combination of formulas. Agencies to whom this legislative power has been delegated are free, within the ambit of their statutory authority, to make the pragmatic adjustments which may be called for by particular circumstances.⁹

Moreover, making such pragmatic adjustments is part of the Commission's duty:

What annual rate will constitute just compensation depends upon many circumstances and must be determined by the exercise of a fair and enlightened judgment, having regard to all relevant facts.¹⁰

And:

[T]he Commission [is] not bound to the use of any single formula or combination of formulae in determining rates. Its rate-making function, moreover, involves the making of 'pragmatic adjustments.'¹¹

Thus, the law requires a just and reasonable end, but does not specify a means:

Under the statutory standard of 'just and reasonable' it is the result reached not the method employed which is controlling. It is not theory but the impact of the rate order which counts.¹²

Determining whether a rate adjustment is necessary requires comparing Empire's current net income to Empire's revenue requirement. Revenue requirement is the amount of money that a utility may collect per year, which depends on the requirements for providing safe and effective service at a profit. Those requirements are tangible and intangible:

From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on the debt and dividends on the stock.¹³

That and similar holdings have led to a conventional analysis of the resources devoted to service, from which the Commission determines revenue requirement.

⁸ *Federal Power Com'n v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944).

⁹ *Federal Power Com'n v. Natural Gas Pipeline Co.*, 315 U.S. 575, 586 (1942).

¹⁰ *Bluefield*, 262 U.S. at 692.

¹¹ *State ex rel. Associated Natural Gas Co. v. Public. Serv. Com'n*, 706 S.W.2d 870, 873 (Mo. App. 1985) (citing *Hope Natural Gas Co.*, 320 U.S. at 602-03).

¹² *Id.*

¹³ *Hope Natural Gas Co.*, 320 U.S. at 603 (1944).

To provide service, a utility devotes resources, which accounting conventions classify as either expense or investment. Expenses include operation, replacement of capital items as they depreciate ("current depreciation"), and taxes on the return. Investment is the basis ("rate base") on which the utility seeks profit ("return"). Return is therefore a percentage ("rate of return") of rate base. Rate base includes capital assets ("gross plant"), less historic deterioration of such assets ("accumulated depreciation"), plus other items.

Those components relate to each other in the following formula:

Revenue Requirement = Cost of Providing Utility Service or $RR = O + (V - D) R$
where,

RR = Revenue Requirement;
O = Operating Costs; (such as fuel, payroll, maintenance, etc.,
Depreciation and Taxes);
V = Gross Valuation of Property Used for Providing Service;
D = Accumulated Depreciation Representing the Capital Recovery
of Gross Property Investment.
(V - D) = Rate Base (Gross Property Investment less Accumulated
Depreciation = Net Property Investment)
R = Overall Rate of Return or Weighted Cost of Capital
(V - D) R = Return Allowed on Net Property Investment

However, determining the revenue requirement does not end the analysis because the utility must collect that amount from its customers, and all customers need not receive identical treatment. Rate design is how a utility distributes its revenue requirement among its various classes of customer. Customers vary as to the costs attributable to their service. Accordingly, their rates should reflect their costs, respectively. Just and reasonable rates may account for such differences among customers.

Conclusions¹⁴

A utility has the burden of proving that increased rates are just and reasonable¹⁵ by a preponderance of the evidence.¹⁶ In this order, the Commission grants the signatory parties' unopposed request to enter all pre-filed testimony and affidavits prepared by the parties into the record. The record thus contains substantial and competent evidence. The Commission has compared the substantial and competent evidence on the whole record with the Agreement as to both rate adjustment and rate design. The Commission independently finds and concludes that Empire has met its burden of proof that the rates proposed in the Agreement are just and reasonable rates. Additionally, upon review of the record and the Agreement, the Commission independently finds and concludes that the Agreement's proposed terms support safe and adequate service.

¹⁴ Section 386.420.2, RSMo 2000 requires a report of the Commission's conclusions.

¹⁵ Section 393.150.2, RSMo 2000.

¹⁶ *State Board of Nursing v. Berry*, 32 S.W.3d 638, 641 (Mo. App. 2000).

THE COMMISSION ORDERS THAT:

1. The *Nonunanimous Stipulation and Agreement* filed on February 22, 2013, is approved. The signatory parties shall comply with the terms of the *Nonunanimous Stipulation and Agreement*, specifically including paragraph 16 of that Agreement.¹⁷ A copy of the Agreement shall be attached to this order as "Attachment A" and is incorporated by reference as if fully set forth herein.

2. The tariff sheets submitted under Tariff File No. YE-2013-0020, on July 6, 2012, by The Empire District Electric Company, for the purpose of increasing rates for electric service, are rejected. The specific tariff sheets rejected are:

P.S.C. MO. No. 5

Sec. A, 27th Revised Sheet No. 1; Canceling Sec. A, 26th Revised Sheet No. 1

Sec. B, 1st Revised Sheet No. 17; Canceling Sec. B, Original Sheet No. 17

Sec. B, 1st Revised Sheet No. 18; Canceling Sec. B, Original Sheet No. 18

Sec. B, 2nd Revised Sheet No. 19; Canceling Sec. B, 1st Revised Sheet No. 19

Sec. 1, 17th Revised Sheet No. 1; Canceling Sec. 1, 16th Revised Sheet No. 1

Sec. 2, 16th Revised Sheet No. 1; Canceling Sec. 2, 15th Revised Sheet No. 1

Sec. 2, 16th Revised Sheet No. 2; Canceling Sec. 2, 15th Revised Sheet No. 2

Sec. 2, 16th Revised Sheet No. 3; Canceling Sec. 2, 15th Revised Sheet No. 3

Sec. 2, 17th Revised Sheet No. 4; Canceling Sec. 2, 16th Revised Sheet No. 4

Sec. 2, 16th Revised Sheet No. 6; Canceling Sec. 2, 15th Revised Sheet No. 6

Sec. 2, 16th Revised Sheet No. 7; Canceling Sec. 2, 15th Revised Sheet No. 7

Sec. 2, 12th Revised Sheet No. 9; Canceling Sec. 2, 11th Revised Sheet No. 9

Sec. 2, 9th Revised Sheet No. 9b; Canceling Sec. 2, 8th Revised Sheet No. 9b

Sec. 3, 17th Revised Sheet No. 1; Canceling Sec. 3, 16th Revised Sheet No. 1

Sec. 3, 21st Revised Sheet No. 2; Canceling Sec. 3, 20th Revised Sheet No. 2

Sec. 3, 16th Revised Sheet No. 3; Canceling Sec. 3, 15th Revised Sheet No. 3

Sec. 3, 16th Revised Sheet No. 4; Canceling Sec. 3, 15th Revised Sheet No. 4

Sec. 3, 5th Revised Sheet No. 5; Canceling Sec. 3, 4th Revised Sheet No. 5

Sec. 4, 1st Revised Sheet No. 17h; Canceling Sec. 4, Original Sheet No. 17h

Sec. 4, 1st Revised Sheet No. 17i; Canceling Sec. 4, Original Sheet No. 17i

Sec. 4, 1st Revised Sheet No. 17j; Canceling Sec. 4, Original Sheet No. 17j

Sec. 4, 3rd Revised Sheet No. 17k; Canceling Sec. 4, 2nd Revised Sheet No. 17k

Sec. 4, Original Sheet No. 22

Sec. 4, Original Sheet No. 22a

Sec. 4, Original Sheet No. 22b

¹⁷ In the Agreement, the parties specifically request that this order include the terms described in paragraph 16 of the Agreement. Since the Commission is incorporating the Agreement in its entirety into this order, there is no need to re-state that paragraph.

3. The prefiled testimony, including all exhibits, appendices, schedules, etc. attached thereto, as well as all reports of all witnesses, that are already filed in the Commission's Electronic Filing and Information System ("EFIS") are hereby admitted into evidence. A notation in EFIS for the issuance of this order shall stand in lieu of a notation in EFIS for any exhibit's entry into the record.

4. Empire shall file new tariff sheets consistent with this order and the specimen tariff sheets attached to the Agreement no later than February 28, 2013, bearing an effective date of April 1, 2013.

5. The Commission's Staff shall file a recommendation regarding approval of Empire's new tariff sheets no later than March 6, 2013.

6. Any other party wishing to respond to Empire's new tariff sheets shall file such response no later than March 6, 2013.

7. This order shall become effective on March 6, 2013, except for paragraphs 4, 5 and 6, which shall become effective immediately upon this order's issuance.

Gunn, Chm., Jarrett, R. Kenney,
Stoll, and W. Kenney, CC., concur.

Bushmann, Regulatory Law Judge

NOTE: The Stipulation and Agreement in this case has not been published. If needed, this document is available in the official case files of the Public Service Commission.

In the Matter of Joint Application of Bilyeu Water Co., LLC and Bilyeu Ridge Water Company, LLC for Authority of Bilyeu Water Co, LLC to Sell Assets to Bilyeu Ridge Water Company, LLC

File No. WM-2013-0329

WATER

- §4. Transfer, lease and sale**
- §13. Construction and equipment**
- §20. Depreciation**
- §27. Reports, records and statements**

Conditions on which the Commission approved the merger of water companies included standards for reporting depreciation, recordkeeping standards, and inspection and replacement of meters.

ORDER APPROVING APPLICATION

Issue Date: February 27, 2013

Effective Date: March 9, 2013

Syllabus: This order approves the joint application of Bilyeu Water Co., (“Bilyeu”) and Bilyeu Ridge Water Company (“Bilyeu Ridge”) for Bilyeu to sell its water system to Bilyeu Ridge.

Procedural History

On December 7, 2012, Bilyeu and Bilyeu Ridge filed a joint application. That application requests, among other things, authority from the Commission for Bilyeu to sell its sewer system to Bilyeu Ridge. Bilyeu and Bilyeu Ridge entered into an agreement in August 2012, in which Bilyeu Ridge agreed to purchase Bilyeu’s water system.

The Commission issued notice of this application on December 11, 2012. In that notice, the Commission allowed anyone who wished to intervene until December 31, 2012 to request intervention. The Commission received no intervention requests.

Staff filed its Recommendation on February 1, 2013. Staff recommended that the Commission approve the transaction, with certain conditions. The Office of the Public Counsel (“OPC”) responded on February 11, 2013. OPC stated that while it largely accepted Staff’s Recommendation and conditions, it preferred slightly different language on some conditions that Staff proposed. Staff responded on February 13, 2013, stating that while it still preferred the language from its Recommendation, it did not object to OPC’s suggested language.

Commission Rule 4 CSR 240-2.080(15) gives parties ten days to respond to pleadings unless otherwise ordered by the Commission. The Commission issued no order to the contrary, more than ten days have elapsed since OPC’s pleading, and no party has objected. Thus, the Commission will grant the application with the conditions suggested by Staff, modified by the language requested by OPC.

Discussion

The application is within the Commission's jurisdiction to decide.¹ Because no party objects to the application, no evidentiary hearing is required.² Thus, the Commission deems the hearing waived,³ and bases its findings on the verified filings, and makes its conclusions as follows.

The Commission issued Bilyeu a certificate of convenience and necessity to provide water service in File No. WA-2007-0270. Bilyeu currently provides water service to approximately 57 customers in Christian County, Missouri. Bilyeu Ridge is a new created entity that is wholly owned by Ozark International, Inc. Ozarks also wholly owns four other Commission-regulated water utilities.

The Commission may approve of a sale of a water company if that sale is not detrimental to the public interest.⁴ Based on the verified pleadings, the Commission finds that granting the application for the sale of the sewer company would not be detrimental to the public interest.

The application will be granted, subject to the conditions listed below.

THE COMMISSION ORDERS THAT:

1. The Joint Application is granted.
2. The Commission authorizes the sale and transfer of water utility assets from Bilyeu Water Co. to Bilyeu Ridge Water Company.
3. Bilyeu Water Co. shall transfer all books and records of Bilyeu Water Co. including, but not limited to, purchase orders, invoices, contracts and agreements relating to the Bilyeu Water Co. operations, drawings and blueprints of the water system, plant records, operations records, and expense records and all customer billing records to Bilyeu Ridge Water Company upon closing of the sale of the assets.
4. Bilyeu Ridge Water Company shall adopt the individual plant-in-service, and depreciation reserve utilized by the Audit Staff valued as of December 31, 2012, for purposes of determining the appropriate rate base in this proceeding as a starting point for plant-in-service, and depreciation reserve for Bilyeu Ridge Water Company, to be recorded in the books and records of Bilyeu Ridge Water Company, and Bilyeu Ridge Water Company is required to maintain and retain proper plant in service, depreciation reserve, cost of removal, and salvage records on a going forward basis.
5. Ozark International, Inc., shall utilize time reporting sheets to ensure utility costs are allocated to all its regulated utilities similar to those discussed with Ozark International Inc., in the Taney County and Valley Woods acquisitions made in 2012.
6. Bilyeu Ridge Water Company shall assume full responsibility for payment of the Commission assessment and filing the annual report with the Commission.

¹ Section 393.190 RSMo 2000.

² *State ex rel. Rex Deffenderfer Ent., Inc. v. Public Serv. Com'n*, 776 S.W.2d 494 (Mo. App. 1989).

³ Section 536.060, RSMo 2000.

⁴ See Commission Rule 4 CSR 240-3.605(1)(D).

7. The Commission orders no recovery of the identified acquisition premium in this or any future rate case.

8. Bilyeu Ridge Water Company shall notify Staff within five days of the completion of the transfer of the properties upon which the well house and storage tanks are located on land designated as Lots 16 and 17 of the subdivision. This notification is based on the agreement already in place between Bilyeu Ridge Water Company and the current owners of the land to transfer upon Commission approval of this Application. If the transfer does not occur within thirty days of the effective date of the Commission Order, then Bilyeu Ridge Water Company will submit progress reports each thirty days explaining the delay and the proposed remedy. This is required until the transfer is complete.

9. Bilyeu Ridge Water Company shall use the schedule of depreciation rates set out in Attachment A of the Staff Memorandum from the date of transfer forward, until changed by any future order of the Commission.

10. Bilyeu Ridge Water Company shall maintain utility plant records and customer account records as acquired from Bilyeu Water Co., and shall keep all books and records, including plant property records, in accordance with the Uniform System of Accounts, as described in Staff's Memorandum.

11. Bilyeu Ridge Water Company shall file an adoption notice tariff sheet, and revised title page and index sheets, similar to Attachment B, as a 30-day tariff filing, within five days after closing of the assets, and the Commission authorizes Bilyeu Ridge Water Company, upon closing to provide water service under the existing tariffs of Bilyeu Water Co. on an interim basis until the effective date of such adoption notice tariff sheets.

12. Bilyeu Ridge Water Company shall continue with meter testing or changeouts immediately after closing of the assets.

13. On the effective date of the tariff sheets from paragraph 11, the Commission cancels the certificate of convenience and necessity granted to Bilyeu Water Co. for the provision of water service, and grants a certificate of convenience and necessity to Bilyeu Ridge Water Company for the provision of water service for the described service areas.

14. The Commission makes no finding that would preclude the Commission from considering the ratemaking treatment to be afforded any matters (except as delineated above), including future expenditures by Bilyeu Ridge Water Company, in any later proceeding.

15. This order shall become effective on March 9, 2013.

Gunn, Chm., Jarrett, R. Kenney,
Stoll, and W. Kenney, CC., concur.

Pridgin, Senior Regulatory Law Judge

In the Matter of the Amount Assessed on Companies to Fund the Missouri Universal Service Fund**File No. TO-2013-0397****TELECOMMUNICATIONS****§14.1 Universal Service Fund**

Statutes provide contributions to the Universal Service Fund through an assessment levied on telecommunications companies. Filings showed that a reduced assessment would “ensure just, reasonable, and affordable rates for reasonably comparable essential local telecommunications services throughout the state.” Therefore, the Commission reduced assessments for telecommunications companies.

ORDER DECREASING ASSESSMENT RATE

Issue Date: March 6, 2013

Effective Date: April 5, 2013

On February 15, 2013, the Staff of the Commission, acting at the request of the Missouri Universal Service Board, filed a motion asking the Commission to approve a decrease of the Missouri Universal Service Fund assessment rate from .0025 to .0017, to be effective on July 1, 2013, as recommended by the Board at its February 13 meeting. The Commission directed that notice of Staff’s motion be sent to all interexchange carriers, competitive local exchange carriers, incumbent local exchange carriers, and IVoIP providers doing business in Missouri. The Commission also ordered that any person, entity wishing to intervene, or otherwise respond to Staff’s motion do so no later than March 1, 2013. No such application to intervene or other response was filed.

Section 392.248.1, RSMo 2000 creates the Missouri Universal Service Board and charges it with the duty to “ensure just, reasonable, and affordable rates for reasonably comparable essential local telecommunications services throughout the state.” That statute also creates a state Universal Service Fund that is funded through an assessment on all telecommunications companies in the state. The Commission is required to establish the level of funding needed to accomplish the purposes of the Universal Service Fund.¹

Staff’s motion explains that the Missouri Universal Service Board has determined that the Universal Service Fund’s needs can be met with a reduced assessment rate of .0017 to replace the existing rate of .0025. The Board recommends that the reduced assessment rate become effective on July 1, 2013, to allow the affected telecommunications companies time to adjust the bills they send to their customers.

The Commission finds that the Universal Service Board’s recommendation is reasonable. Furthermore, no person or entity has expressed any opposition to that recommendation. The Commission will reduce the assessment rate as recommended by the Universal Service Board.

¹ Section 392.248.3, RSMo 2000.

THE COMMISSION ORDERS THAT:

1. The assessment rate for the Missouri Universal Service Fund is reduced from .0025 to .0017, effective July 1, 2013.
2. The Commission's Data Center shall send a copy of this order to all interexchange carriers, competitive local exchange carriers, incumbent local exchange carriers and IVolP providers doing business in Missouri.
3. This order shall become effective on April 5, 2013.

R. Kenney, Chm., Jarrett, Stoll, and
W. Kenney, CC., concur.

Woodruff, Chief Regulatory Law Judge

Big River Telephone Company, LLC, Complainant, v. Southwestern Bell Telephone Company, d/b/a AT&T Missouri, Respondent.

File No. TC-2012-0284

TELECOMMUNICATIONS

§46. Interconnection Agreements

Interconnection agreement between telecommunications companies provided that one company owed access charges to another when delivering interconnected voice over internet protocol ("I-VOIP") traffic. I-VOIP traffic is characterized by a broadband connection, which means anything faster than dial-up. Complainant showed that the traffic at issue was within that description, so it carried its burden of proving that access charges were due on that service.

REPORT AND ORDER

Issue Date: March 27, 2013
Effective Date: April 26, 2013

APPEARANCES

Appearing for **BIG RIVER TELEPHONE COMPANY, LLC:**

Brian C. Howe, 12444 Powerscourt Drive, Suite 270, St. Louis, Missouri 63131.

Appearing for **SOUTHWESTERN BELL TELEPHONE COMPANY d/b/a AT&T MISSOURI:**

Robert J. Gryzmala, One AT&T Center, Room 3516, St. Louis, Missouri 63101.

Hans J. Germann, Mayer Brown LLP, 71 S. Wacker Drive, Chicago, Illinois 60606.

Appearing for the **STAFF OF THE MISSOURI PUBLIC SERVICE COMMISSION:**

Colleen M. Dale, Senior Counsel, and **John D. Borgmeyer**, Legal Counsel,
Governor Office Building, 200 Madison Street, Jefferson City, Missouri 65102.

REGULATORY LAW JUDGE: Michael Bushmann

I. Procedural History

On March 1, 2012, Big River Telephone Company, LLC ("Big River") filed a complaint with the Missouri Public Service Commission ("Commission") against Southwestern Bell Telephone Company d/b/a AT&T Missouri ("AT&T Missouri"). Big River alleged that AT&T Missouri has improperly imposed exchange access charges against it, in violation of the interconnection agreement between the parties and federal law, because the traffic Big River delivered to AT&T Missouri is enhanced or information services traffic.

After an attempt at mediation between the two parties failed, AT&T Missouri filed an answer to the complaint, which included a cross-complaint against Big River. AT&T Missouri alleged that Big River is liable for access charges for all telephone traffic delivered to AT&T Missouri that is either interconnected voice over internet protocol traffic (i-VoIP) or that is not enhanced/information services traffic. On December 19, 2012, the Commission denied Big River's motion for summary determination. On January 8-9, 2013, the Commission conducted an evidentiary hearing on the complaint and cross-complaint.¹

II. Findings of Fact

Any finding of fact for which it appears that the Commission has made a determination between conflicting evidence is indicative that the Commission attributed greater weight to that evidence and found the source of that evidence more credible and more persuasive than that of the conflicting evidence. On December 17, 2012, the parties filed a *Joint Stipulation of Non-Disputed Material Facts*, which the Commission incorporates and adopts in its entirety as its own Findings of Fact.

1. Big River is a competitive facilities-based telecommunications limited liability company duly organized and existing under and by virtue of the laws of the State of Delaware and duly authorized to do business in the State of Missouri as a foreign corporation with its principal place of business located at 24. S. Minnesota Ave., Cape Girardeau, Missouri 63702.²

2. Big River, pursuant to authority granted by the Commission, provides intrastate switched and non-switched local exchange and interexchange telecommunications services in Missouri. Big River is also an authorized provider of interstate telecommunications services in Missouri under the jurisdiction of the Federal Communications Commission.³

3. Big River is a "competitive telecommunications company", "local exchange telecommunications company", "interexchange telecommunications company", and a "public utility", and is duly authorized to provide "telecommunications service" within the State of Missouri, as each of those phrases is defined in Section 386.020, RSMo Supp 2012, in accordance with tariffs on file with and approved by the Commission.

4. Southwestern Bell Telephone Company d/b/a AT&T Missouri is a corporation, is the successor in interest to Southwestern Bell Telephone, L.P. d/b/a AT&T Missouri, and is an incumbent local exchange carrier ("ILEC").⁴

¹ Transcript, Volumes 4-6. In total, the Commission admitted the testimony of six witnesses and received sixty-one exhibits into evidence. Final post-hearing briefs were filed on February 20, 2013, and the case was deemed submitted for the Commission's decision on that date when the Commission closed the record. "The record of a case shall stand submitted for consideration by the commission after the recording of all evidence or, if applicable, after the filing of briefs or the presentation of oral argument." Commission Rule 4 CSR 240-2.150(1).

² *Joint Stipulation of Non-Disputed Material Facts*, paragraph 1.

³ *Joint Stipulation of Non-Disputed Material Facts*, paragraph 3.

⁴ *Joint Stipulation of Non-Disputed Material Facts*, paragraph 2.

5. Southwestern Bell Telephone Company, d/b/a AT&T Missouri is a "local exchange telecommunications company" and a "public utility," and is duly authorized to provide "telecommunications service" within the State of Missouri, as each of those phrases is defined in Section 386.020, RSMo Supp 2012, in accordance with tariffs on file with and approved by the Commission.⁵

6. The Office of the Public Counsel ("Public Counsel") "may represent and protect the interests of the public in any proceeding before or appeal from the public service commission."⁶ Public Counsel "shall have discretion to represent or refrain from representing the public in any proceeding."⁷ The Public Counsel did not participate in this matter.

7. The Staff of the Missouri Public Service Commission ("Staff") is a party in all Commission investigations, contested cases and other proceedings, unless it files a notice of its intention not to participate in the proceeding within the intervention deadline set by the Commission.⁸

8. On or about August 13, 2005 in Case No. TK-2006-0073, the Commission approved an interconnection agreement ("ICA") made and submitted by Big River and AT&T Missouri, that was the product of an arbitration between the companies before the Commission in Case No. TO-2005-0336. On or about October 25, 2005, the Commission approved errata to the agreement. The ICA was amended again on November 2, 2009, which amendment was submitted to the Commission, Reference No. VT-2010-0011. The ICA and amendments thereto, of which the Commission may take official notice, remain in effect.⁹

9. Section 13.1 of Attachment 12 (entitled "Intercarrier Compensation") of the parties' ICA states:

13.1 For purposes of this Agreement only, Switched Access Traffic shall mean all traffic that originates from an end user physically located in one local exchange and delivered for termination to an end user physically located in a different local exchange (excluding traffic from exchanges sharing a common mandatory local calling area as defined in SBC MISSOURI's local exchange tariffs on file with the applicable state commission) including, without limitation, any traffic that (i) terminates over a Party's circuit switch, including traffic from a service that originates over a circuit switch and uses Internet Protocol (IP) transport technology (regardless of whether only one provider uses IP transport or multiple providers are involved in providing IP transport) and/or (ii) originates from the end user's premises in IP format and is transmitted to the switch of a provider of voice communication applications or services when such switch utilizes IP technology and terminates over a Party's circuit switch.

⁵ Following its June 26, 2007, Order in Case No. TO-2002-185 allowing Southwestern Bell Telephone, L.P., d/b/a AT&T Missouri, to alter its status from a Texas limited partnership to a Missouri corporation, the Commission approved tariff revisions to reflect the new corporate name, Southwestern Bell Telephone Company d/b/a AT&T Missouri. See, *Order Granting Expedited Treatment and Approving Tariffs*, Case No. TO-2002-185, issued June 29, 2007.

⁶ Section 386.710(2), RSMo 2000; Commission Rules 4 CSR 240-2.010(10) and (15) and 2.040(2).

⁷ Section 386.710(3), RSMo 2000; Commission Rules 4 CSR 240-2.010(10) and (15) and 2.040(2).

⁸ Commission Rules 4 CSR 240-2.010(10) and (21) and 2.040(1).

⁹ *Joint Stipulation of Non-Disputed Material Facts*, paragraph 4.

Notwithstanding anything to the contrary in this Agreement, all Switched Access Traffic shall be delivered to the terminating Party over feature group access trunks per the terminating Party's access tariff(s) and shall be subject to applicable intrastate and interstate switched access charges; provided, however, the following categories of Switched Access Traffic are not subject to the above stated requirement relating to routing over feature group access trunks:

(i) IntraLATA toll Traffic or Optional EAS Traffic from a CLEC end user that obtains local dial tone from CLEC where CLEC is both the Section 251(b)(5) Traffic provider and the intraLATA toll provider,

(ii) IntraLATA toll Traffic or Optional EAS Traffic from an SBC end user that obtains local dial tone from SBC where SBC is both the Section 251(b)(5) Traffic provider and the intraLATA toll provider;

(iii) Switched Access Traffic delivered to SBC from an Interexchange Carrier (IXC) where the terminating number is ported to another CLEC and the IXC fails to perform the Local Number Portability (LNP) query; and/or

(iv) Switched Access Traffic delivered to either Party from a third party competitive local exchange carrier over interconnection trunk groups carrying Section 251(b)(5) Traffic and ISP-Bound Traffic (hereinafter referred to as "Local Interconnection Trunk Groups") destined to the other Party. Notwithstanding anything to the contrary in this Agreement, each Party reserves its rights, remedies Big River has delivered to AT&T Missouri for termination to end users non-local traffic, commencing as early as 2005.¹⁰

10. Attachment 12, section 13.3 of the ICA states as follows:

Notwithstanding any other provision of this Agreement, the Parties shall exchange enhanced/information services traffic, including without limitation Voice Over Internet Protocol ("VOIP") traffic and other enhanced services traffic (collectively, "IS Traffic"), in accordance with this section. IS Traffic is defined as traffic that undergoes a net protocol conversion, as defined by the FCC, between the calling and called parties, and/or traffic that features enhanced services that provide customers a capability for generating, acquiring storing, transforming, processing, retrieving, utilizing, or making available information. The Parties shall exchange IS Traffic over the same interconnection trunk groups used to exchange local traffic. In addition to other jurisdictional factors the Parties may report to one another under this Agreement, the Parties shall report a Percent Enhanced Usage ("PEU") factor on a statewide basis or as otherwise determined by CLEC at its sole discretion. The numerator of the PEU factor shall be the number of minutes of IS Traffic sent to the other Party for termination to such other Party's customers. The denominator of the PEU factor shall be the total combined number of minutes of traffic, including IS Traffic, sent over the same trunks

¹⁰ Joint Stipulation of Non-Disputed Material Facts, paragraph 5.

as IS Traffic. Either Party may audit the other Party's PEU factors pursuant to the audit provisions of this Agreement. The Parties shall compensate each other for the exchange of IS Traffic applying the same rate elements used by the Parties for the exchange of ISP-bound traffic whose dialing patterns would otherwise indicate the traffic is local traffic. This compensation regime for IS Traffic shall apply regardless of the locations of the calling and called parties, and regardless of the originating and terminating NPA/NXXs.¹¹

11. By letter dated October 20, 2005, Big River informed AT&T Missouri that its "Percent Enhanced Usage ("PEU") for the state of Missouri is 100% as of the effective date of the Interconnection Agreement."¹²

12. Big River filed suit against AT&T Missouri in St. Louis County Circuit Court on or about September 29, 2008, Cause No. 08SLCC01630, in which Big River alleged that "AT&T billed Big River \$487,779.00 for terminating Enhanced/Information Services traffic sent by Big River to AT&T," that Big River paid these charges, that Big River was entitled to a refund of these payments and that AT&T did not refund the payments.¹³

13. Paragraph 9 of the *Joint Stipulation of Non-Disputed Material Facts* relates to the terms of an October 31, 2009 settlement agreement between Big River and AT&T Missouri, which resolved a variety of claims and issues involved in the above-referenced lawsuit. The Commission adopts as a finding of fact the complete paragraph 9 stated in the *Joint Stipulation of Non-Disputed Material Facts*, but as those terms have been designated as Highly Confidential they are omitted in this order.

14. The amendment to the ICA, as approved by the Commission on November 5, 2009, states:

The Parties shall exchange interconnected voice over Internet protocol service traffic, as defined in Section 386.020 RSMo., subject to the appropriate exchange access charges to the same extent that telecommunications services are subject to such charges; provided, however, to the extent that as of August 28, 2008, the Agreement contains intercarrier compensation provisions specifically applicable to interconnected voice over Internet protocol service traffic, those provisions shall remain in effect through December 31, 2009, and the intercarrier compensation arrangement described in the first clause of this Section shall not become effective until January 1, 2010.¹⁴

¹¹ *Joint Stipulation of Non-Disputed Material Facts*, paragraph 6.

¹² *Joint Stipulation of Non-Disputed Material Facts*, paragraph 7.

¹³ *Joint Stipulation of Non-Disputed Material Facts*, paragraph 8.

¹⁴ *Joint Stipulation of Non-Disputed Material Facts*, paragraph 10.

15. Section 392.550(2) RSMo states:

Interconnected voice over internet protocol service shall be subject to appropriate exchange access charges to the same extent that telecommunications services are subject to such charges. Until January 1, 2010, this subsection shall not alter intercarrier compensation provisions specifically addressing interconnected voice over internet protocol service contained in an interconnection agreement approved by the commission pursuant to 47 U.S.C. Section 252 and in existence as of August 28, 2008.¹⁵16. Section 386.020, RSMo, defines “Interconnected voice over Internet protocol service” as service that:

- (a) Enables real-time, two-way voice communications;
- (b) Requires a broadband connection from the user’s location;
- (c) Requires Internet protocol-compatible customer premises equipment; and
- (d) Permits users generally to receive calls that originate on the public switched telephone network and to terminate calls to the public switched telephone network.¹⁶

17. Section 13.5.1 of the General Terms and Conditions further provides: “Except as otherwise specifically set forth in this Agreement, for all disputes arising out of or pertaining to this Agreement, including but not limited to matters not specifically addressed elsewhere in this Agreement require clarification, renegotiation, modifications or additions to this Agreement, either party may invoke dispute resolution procedures available pursuant to the complaint process of the MO-PSC....”¹⁷

18. AT&T Missouri billed Big River monthly on Billing Account Number (BAN) 110 401 0113 803 on or about February 5, 2010 and thereafter.¹⁸

19. Big River claims that its PEU continues to be 100%, which AT&T Missouri denies.¹⁹

20. Sections 9 and 13 of the General Terms and Conditions of the Commission-approved ICA govern billing dispute resolution.²⁰

21. Big River invoked the informal dispute resolution (“IDR”) process disputing 100% of the billing on BAN 110 401 0113 803 by letter dated April 19, 2011, signed by John Jennings and which indicated that Mr. Jennings would be Big River’s representative for the informal dispute resolution.²¹

22. AT&T Missouri responded to Big River’s request for an informal dispute resolution by an e-mail sent on May 10, 2011 by Eileen Mastracchio, acknowledging Big River’s IDR request and explaining that Janice Mullins would be AT&T’s contact for handling the IDR.²²

¹⁵ Joint Stipulation of Non-Disputed Material Facts, paragraph 11.

¹⁶ Joint Stipulation of Non-Disputed Material Facts, paragraph 12.

¹⁷ Joint Stipulation of Non-Disputed Material Facts, paragraph 13.

¹⁸ Joint Stipulation of Non-Disputed Material Facts, paragraph 14.

¹⁹ Joint Stipulation of Non-Disputed Material Facts, paragraph 15.

²⁰ Joint Stipulation of Non-Disputed Material Facts, paragraph 16.

²¹ Joint Stipulation of Non-Disputed Material Facts, paragraph 17.

²² Joint Stipulation of Non-Disputed Material Facts, paragraph 18.

23. Mr. Jennings and Ms. Mullins participated in a conference call on May 13, 2011, in an attempt to resolve the billing issue.²³

24. Mr. Jennings and Ms. Mullins continued the IDR through November 1, 2011, at which time Ms. Mullins informed Mr. Jennings by letter that AT&T Missouri denied the dispute.²⁴

25. On February 15, 2012, AT&T Missouri conveyed to Big River that should Big River's refusal to pay continue, Big River's requests for additional service would not be accepted and provisioning activity on all pending orders would be suspended.²⁵

26. Big River filed its Complaint in this matter on March 1, 2012.²⁶

27. Subsequent to the filing of Big River's Complaint, AT&T Missouri has not suspended or refused to accept a request for additional service from Big River.²⁷

28. Since January 1, 2010, the traffic that Big River delivered to AT&T Missouri over the interconnection trunks established pursuant to the parties' ICA originated in Internet Protocol ("IP") format.²⁸

29. Since January 1, 2010, the traffic that Big River delivered to AT&T Missouri over the interconnection trunks established pursuant to the parties' ICA was Voice over Internet Protocol ("VoIP") traffic.²⁹

30. Since January 1, 2010, the traffic that Big River delivered to AT&T Missouri over the interconnection trunks established pursuant to the parties' ICA originated with Big River telephone service customers using IP-enabled customer premises equipment.³⁰

31. Since January 1, 2010, Big River's telephone service has (among other things) allowed Big River's customers to make voice telephone calls to, and receive voice telephone calls from, the public switched telephone network (PSTN).³¹

32. Since January 1, 2010, Big River's telephone service has (among other things) allowed Big River's customers to make voice telephone calls to, and receive voice telephone calls from, customers of AT&T Missouri.³²

33. Since January 1, 2010, Big River's telephone service has (among other things) allowed Big River's customers to engage in real-time, two-way voice communications with customers served via the PSTN.³³

34. Big River partners with cable companies to provide telephone service in IP format over the cable companies' "last mile" facilities, and in some cases uses DSL (broadband service provided over "last mile" telephone facilities) to provide telephone service in IP format.³⁴

²³ Joint Stipulation of Non-Disputed Material Facts, paragraph 19.

²⁴ Joint Stipulation of Non-Disputed Material Facts, paragraph 20.

²⁵ Joint Stipulation of Non-Disputed Material Facts, paragraph 21.

²⁶ Joint Stipulation of Non-Disputed Material Facts, paragraph 22.

²⁷ Joint Stipulation of Non-Disputed Material Facts, paragraph 23.

²⁸ Joint Stipulation of Non-Disputed Material Facts, paragraph 24.

²⁹ Joint Stipulation of Non-Disputed Material Facts, paragraph 25.

³⁰ Joint Stipulation of Non-Disputed Material Facts, paragraph 26.

³¹ Joint Stipulation of Non-Disputed Material Facts, paragraph 27.

³² Joint Stipulation of Non-Disputed Material Facts, paragraph 28.

³³ Joint Stipulation of Non-Disputed Material Facts, paragraph 29.

³⁴ Joint Stipulation of Non-Disputed Material Facts, paragraph 30.

35. Big River submitted a sworn application to the Minnesota commission explaining that to provide telephone service, “[c]ustomers will be accessed through the broadband connections of local Cable TV operators,” and Big River provides service in other states in the same manner.³⁵

36. Big River provides voice telephone service to some customers in Missouri, who originate telephone calls in IP format over IP-enabled customer premises equipment, pursuant to tariffs filed with the Commission.³⁶

37. Sections 9.2 and 9.3 of the General Terms and Conditions of the parties’ ICA state:

9.2. All billing disputes between the Parties shall be governed by this Section and Section 13.

9.3. If any portion of an amount due to a Party (the “Billing Party”) under this Agreement is subject to a bona fide dispute between the Parties, the Party billed (the “Non-Paying Party”) must, prior to the Bill Due Date, give written notice to the Billing Party of the amounts it disputes (“Disputed Amounts”) and include in such written notice the specific details and reasons for disputing each item that is listed in Section 13.4.1. The Non-Paying Party should utilize any existing and preferred form provided by the Billing Party to provide written notice of disputes to the Billing Party. The Non-Paying Party must pay when due: (i) all undisputed amounts to the Billing Party.³⁷

38. Section 13.4 of the General Terms and Conditions of the parties’ ICA provides:

In order to resolve a billing dispute, the disputing Party shall furnish written notice which shall include sufficient detail of and rationale for the dispute, including to the extent available, the (i) date of the bill in question, (ii) CBA/ESBA/ASBS or BAN number of the bill in question, (iii) telephone number(s) in question, (iv) circuit ID number or trunk number in question, (v) any USOC information relating to the item(s) questioned, (vi) amount billed, (vii) amount disputed, (viii) the reason the disputing Party disputes the billed amount, (ix) minutes of use disputed by jurisdictional category, and (x) the contact name, email address and telephone number.³⁸

39. Big River’s digital telephone service is designed for and marketed to customers that use a broadband connection.³⁹

40. Big River represented to the Federal Communications Commission by verified letter on November 28, 2005 that it was in compliance with i-VoIP E911 service requirements and acknowledged that Big River customers can update their location information “using the VoIP telephone equipment that they use to access their interconnected VoIP service”.⁴⁰

³⁵ Joint Stipulation of Non-Disputed Material Facts, paragraph 31.

³⁶ Joint Stipulation of Non-Disputed Material Facts, paragraph 32.

³⁷ Joint Stipulation of Non-Disputed Material Facts, paragraph 33.

³⁸ Joint Stipulation of Non-Disputed Material Facts, paragraph 34.

³⁹ ATT Ex. 20, 21.

⁴⁰ ATT Ex. 22.

41. Big River CEO Gerard Howe testified to the Kansas Corporation Commission that Big River is an i-VolP service provider using broadband connections to connect its customers.⁴¹

42. Big River has not registered with the Missouri Public Service Commission as an i-VolP provider.⁴²

43. Big River is able to connect a telephone call on its system at 40 kilobits per second.⁴³ Big River provides DSL service at this speed to a very small percentage of its customer base in Missouri.⁴⁴

44. Dial-up Internet service, also known as analog or narrowband, connects at a speed of 14.4 kilobits per second.⁴⁵ Big River does not provide service over dial-up connections.⁴⁶ 40 kilobits per second is faster than 14.4 kilobits per second.

45. Staff's witness, William Voight, testified credibly that the Big River traffic at issue that was delivered to AT&T Missouri involves an Internet protocol conversion at the customers' premises, which requires a broadband connection.⁴⁷ Big River's traffic cannot be sent using a dial-up service connection.⁴⁸ Connection speeds for an individual broadband connection may fluctuate, but those fluctuations do not mean that the connection is not broadband while connecting at a slower speed.⁴⁹

46. Mr. Voight testified credibly that broadband means a connection speed faster than dial-up service⁵⁰ and that Big River's service requires a broadband connection at the user's location.⁵¹

47. The access charge rates for billing purposes are tariff rates incorporated by reference into the ICA.⁵² AT&T Missouri's federal tariff, filed with the FCC, requires Big River to pay access charges on the interstate traffic AT&T Missouri has terminated for Big River, and AT&T Missouri's state tariff, filed with the Commission, requires Big River to pay access charges on the intrastate non-local traffic AT&T Missouri has terminated for Big River.⁵³

48. At no time during the IDR process between Big River and AT&T Missouri did Big River dispute the accuracy of AT&T Missouri's calculation of the access charges billed to Big River.⁵⁴

⁴¹ ATT Ex. 24, p. 11; ATT Ex. 25, p. 6-7.

⁴² Big River Ex. 2, Howe Rebuttal, p. 16; ATT Ex. 14, G. Howe Deposition, p. 26-28.

⁴³ Big River Ex. 3, Howe Surrebuttal, p. 4.

⁴⁴ Transcript, Vol. 4, p. 68-69.

⁴⁵ Transcript, Vol. 4, p. 68.

⁴⁶ Transcript, Vol. 4, p. 64.

⁴⁷ Transcript, Vol. 6, p. 254-255.

⁴⁸ *Id.*

⁴⁹ Transcript, Vol. 6, p. 255-256.

⁵⁰ Transcript, Vol. 6, p. 254-255.

⁵¹ Transcript, Vol. 6, p. 252.

⁵² ATT Ex. 5, Greenlaw Direct (NP), p. 19-20.

⁵³ *Id.*

⁵⁴ ATT Ex. 8, Mullins Surrebuttal, p. 5-6.

49. The correct total amount billed for access charges on BAN 110 401 0113 803 by AT&T Missouri for traffic Big River delivered to AT&T Missouri between January 1, 2010 and January 4, 2013 is \$352,123.48.⁵⁵

III. Conclusions of Law

Big River and AT&T Missouri are “telecommunications companies” and “public utilities” as those terms are defined by Section 386.020, RSMo. Supp. 2011. Big River and AT&T Missouri are subject to the Commission’s jurisdiction, supervision, control, and regulation as provided in Chapters 386 and 392, RSMo. The Commission has the authority under 47 U.S.C. §252(e) to approve interconnection agreements negotiated under the Telecommunications Act of 1996. This authority includes the power to interpret and enforce the agreements the Commission has approved.⁵⁶

Since Big River brought the complaint, it bears the burden of proof. The burden of proof is the preponderance of the evidence standard.⁵⁷ In order to meet this standard, Big River must convince the Commission it is “more likely than not” that its allegations are true.⁵⁸ Similarly, AT&T Missouri bears the burden of proof for its cross-complaint.

The first issue for determination is whether the traffic that Big River delivered to AT&T Missouri should be classified as interconnected voice over Internet protocol traffic (i-VoIP). If the traffic Big River delivered to AT&T Missouri was i-VoIP traffic, Big River would be liable to AT&T Missouri for exchange access charges under Section 392.550.2, RSMo,⁵⁹ and the parties’ interconnection agreement. Section 386.020(23), RSMo, provides a definition of “interconnected voice over Internet protocol service” that includes four elements⁶⁰ and is substantially the same as the FCC definition.⁶¹ The parties have

⁵⁵ ATT Ex. 33.

⁵⁶ *Southwestern Bell v. Connect Communications Corp.*, 225 F.3d 942, 946 (8th Cir. 2000); *Budget Prepay, Inc. v. AT&T*, 605 F.3d 273 (5th Cir. 2010).

⁵⁷ *Bonney v. Environmental Engineering, Inc.*, 224 S.W.3d 109, 120 (Mo. App. 2007); *State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 548 (Mo. banc 2003); *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104, 110 (Mo. banc 1996).

⁵⁸ *Holt v. Director of Revenue, State of Mo.*, 3 S.W.3d 427, 430 (Mo. App. 1999); *McNear v. Rhoades*, 992 S.W.2d 877, 885 (Mo. App. 1999); *Rodriguez*, 936 S.W.2d at 109-111; *Wollen v. DePaul Health Center*, 828 S.W.2d 681, 685 (Mo. banc 1992).

⁵⁹ “Interconnected voice over Internet protocol service shall be subject to appropriate exchange access charges to the same extent that telecommunications services are subject to such charges. Until January 1, 2010, this subsection shall not alter intercarrier compensation provisions specifically addressing interconnected voice over Internet protocol service contained in an interconnection agreement approved by the commission pursuant to 47 U.S.C. Section 252 and in existence as of August 28, 2008.”

⁶⁰ “Interconnected voice over Internet protocol service”, service that: (a) Enables real-time, two-way voice communications; (b) Requires a broadband connection from the user’s location; (c) Requires Internet protocol-compatible customer premises equipment; and (d) Permits users generally to receive calls that originate on the public switched telephone network and to terminate calls to the public switched telephone network;

⁶¹ *In the Matter of Universal Serv. Contribution Methodology Fed.-State Joint Bd. on Universal Serv. 1998 Biennial Regulatory Review -- Streamlined Contributor Reporting Requirements Associated with Admin. of Telecommunications Relay Serv., N. Am. Numbering Plan, Local No. Portability, & Universal Serv. Support Mechanisms Telecommunications Services for Individuals with Hearing & Speech Disabilities, & the Americans*, 21 F.C.C.R. 7518 (2006), paragraph 36.

stipulated that Big River's traffic meets three of those elements, but the final element in dispute is whether Big River's service "requires a broadband connection from the user's location". Neither the ICA nor Missouri law⁶² defines "broadband connection" in relation to i-VolP.

The Commission concludes that Big River does provide i-VolP service to its customers. Staff presented credible evidence that the Big River traffic at issue involves an Internet protocol conversion at the customers' premises, which requires a broadband connection. The term "broadband" should be considered for the purposes of defining i-VolP as a connection speed faster than dial-up, which connects at 14.4 kilobits per second. Big River's service connections should still be considered to be broadband regardless of the specific speed of the connection because they are faster than analog dial-up service. This definition finds support in language in a U.S. Supreme Court decision, which explained that "[d]ial-up connections are therefore known as "narrowband," or slower speed, connections. "Broadband" Internet service, by contrast, transmits data at much higher speeds. There are two principal kinds of broadband Internet service: cable modem service and Digital Subscriber Line (DSL) service".⁶³ The parties have stipulated that Big River partners with cable and DSL providers to provide telephone service in IP format over those companies' "last mile" facilities, which are broadband connections.

Big River proposes various connection speeds as an appropriate definition of broadband, such as at least 200 kilobits per second and a 4-megabits-per-second standard supposedly required by the FCC.⁶⁴ The Commission decides not to adopt an FCC benchmark as a definition for broadband for purposes of i-VolP, since improving technology will continually change the FCC's goals for broadband deployment across the country and will result in constantly changing benchmarks.

The evidence shows that Big River has represented to the FCC and another state utility commission that it provides i-VolP service and to the public and other commissions that it provides service through broadband connections, but has failed to register in Missouri as an i-VolP provider. The Commission does not agree with Big River's argument that the ability to make a telephone call at a slower than normal connection speed relieves it of its responsibility to pay access charges under the ICA. Big River's interpretation of the statute would render Section 392.550.2, RSMo, meaningless and allow any i-VolP provider to avoid paying access charges as Big River has attempted to do. Big River's system requires a broadband connection for all its customers and, therefore, should be classified as an i-VolP service provider and liable for exchange access charges. In making this determination, the Commission need not consider the additional issue of whether Big River provides enhanced or information services.

⁶² The term "broadband network" is defined elsewhere in Section 392.245.5(2), RSMo, as "a connection that delivers services at speeds exceeding two hundred kilobits per second in at least one direction". (emphasis added) However, this statute deals with whether a provider of local voice service is considered to be a basic local telecommunications service provider, and by its own terms the definition of "broadband network" only applies for the purposes of that subsection. The Commission determines not to adopt that definition for purposes of i-VolP.

⁶³ *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 975, 125 S. Ct. 2688, 2696, 162 L. Ed. 2d 820 (2005).

⁶⁴ The FCC order cited by Big River, however, proposes this connection speed as a policy goal for deployment throughout the country rather than as a legal requirement. See, *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in A Reasonable & Timely Fashion, & Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, As Amended by the Broadband Data Improvement Act*, 27 F.C.C.R. 10342 (2012).

The final issue is what charges should apply under the parties' ICA to the traffic that Big River delivered to AT&T Missouri. AT&T Missouri presented evidence in the form of a spreadsheet, updated to January 4, 2013, showing billing to Big River from February 2010 to December 2012 in the total amount due of \$352,123.48. At no time during the IDR process between Big River and AT&T Missouri did Big River dispute the accuracy of AT&T Missouri's calculation of the access charges billed to Big River. The Commission determines that AT&T Missouri has presented credible and substantial evidence on the amount of the access charges and concludes that Big River owes AT&T Missouri access charges under the ICA in the total amount of \$352,123.48. Since federal law, 47 U.S.C. §252, implicitly grants the Commission the power to enforce interconnection agreements⁶⁵, the Commission will require Big River to pay to AT&T Missouri any charges due and owing under the ICA.

IV. Decision

In making this decision, the Commission has considered the positions and arguments of all of the parties. After applying the facts to the law to reach its conclusions, the Commission concludes that the substantial and competent evidence in the record supports the conclusion that that Big River has failed to meet, by a preponderance of the evidence, its burden of proof to demonstrate that access charges do not apply to traffic Big River delivered to AT&T Missouri since January 1, 2010. Big River's complaint will be denied on the merits.

The Commission also concludes that the substantial and competent evidence in the record supports the conclusion that that AT&T Missouri has met, by a preponderance of the evidence, its burden of proof to demonstrate that the traffic at issue delivered to AT&T Missouri by Big River was i-VoIP traffic to which access charges apply, and that Big River owes AT&T Missouri access charges in the total amount of \$352,123.48.

THE COMMISSION ORDERS THAT:

1. Big River Telephone Company, LLC's complaint is denied.
2. Southwestern Bell Telephone Company d/b/a AT&T Missouri's cross-complaint is granted. Big River Telephone Company, LLC shall pay to Southwestern Bell Telephone Company d/b/a AT&T Missouri all charges due and owing under the ICA, including access charges billed by AT&T Missouri since January 1, 2010 under BAN 110 401 0113 803 in the amount of \$352,123.48.

⁶⁵ *Southwestern Bell v. Connect Communications Corp.*, 225 F.3d at 946.

3. This Report and Order shall become effective on April 26, 2013.
4. This file shall close on April 27, 2013.

R. Kenney, Chm., Jarrett, Stoll, and
W. Kenney, CC., concur, and certify
compliance with the provisions of
Section 536.080, RSMo.
Bushmann, Regulatory Law Judge

NOTE: Affirmed: *Big River Telephone Co. v. Southwestern Bell Telephone Co., d/b/a AT&T Mo.*, 440 S.W.3d 503 (Mo. App. W.D. 2014).

In the Matter of the Joint Application of Moore Bend Water Company, Inc. and Moore Bend Water Utility, LLC for Authority of Moore Bend Water Company, Inc. to Sell Certain Assets to Moore Bend Water Utility, LLC

File No. WM-2012-0335

WATER

§2. Certificate of convenience and necessity

§4. Transfer, lease and sale

Sale of a water company served the public interest, because seller had neglected its duties, and buyer had experience in running a water company.

§4. Transfer, lease and sale

In the sale of a water company, the Commission barred any acquisition premium from future rates, but did not bar any acquisition adjustment.

§4. Transfer, lease and sale

Neither seller nor buyer owned the wells that supplied water to company being sold, so the Commission conditioned approval of the sale on buyer's acquisition of wells and the issuance of a certificate of convenience and necessity to the buyer.

ORDER AUTHORIZING TRANSFER OF ASSETS

Issue Date: April 24, 2013

Effective Date: May 4, 2013

The Application

On February 11, 2012, Moore Bend Water Company, Inc. and Ozark International, Inc. entered into an Asset Purchase Agreement through which Ozark would purchase substantially all of the assets of Moore Bend Water Company that are used to provide water service to the public. On March 30, 2012, Ozark assigned its interest in the Agreement to Moore Bend Water Utility. On April 11, 2012, Moore Bend Water Company, Inc. (Transferor) and Moore Bend Water Utility (Transferee) filed this application seeking authority to transfer assets.

Transferor is an administratively dissolved corporation providing water service to approximately 90 customers near Kisse Mills, Missouri. As a water corporation, it is subject to the Commission's jurisdiction. Transferee is a limited liability company owned by Ozark International, Inc.; a Missouri corporation. The Applicants have agreed on a purchase price of \$20,000.

In support of the application, Applicants state that the proposed transaction is not detrimental to the public interest but will rather support the public interest for the following reasons:

(a) After the transfer is complete, Transferee will be subject to the Commission's jurisdiction.

(b) The manager of Transferee, Hollis H. "Bert" Brower, Jr., has considerable experience in providing water service to residents in Southwest Missouri.

(c) Transferee will be fully qualified to own and operate the system and to provide safe reliable and affordable water service.

(d) Until modified by law, customers will continue to pay the same rates.

Staff Recommendation

On July 9, 2012, the Staff of the Commission filed its Memorandum, recommending that the Commission approve the transfer. Staff states, and the parties agree,¹ that Transferee has adequate technical, managerial, and financial capacity to operate the water system. Upon further investigation, Staff determined that Transferor's Rate Base is \$10,726. And, for this reason, Staff recommends that the rate base valuation for future rate cases should not include the full purchase price of \$20,000. Staff specifically recommends that the Commission:

1. Approve the sale and transfer of assets.
2. Require Transferor to transfer all books and records, including, but not limited to, purchase orders, invoices, contracts and agreements relating to its operations, drawings and blueprints of the water system, plant records, operations records, and expense records and all customer billing records to Transferee upon closing of the asset transfer;
3. Require Transferee to adopt the individual plant-in-service and depreciation reserve utilized by the Audit Staff valued as of March 31, 2012, for purposes of determining the appropriate rate base in this proceeding as a starting point for plant-in-service, and depreciation reserve for Transferee, to be recorded in the books and records of Transferee, and require Transferee to maintain and retain proper plant-in-service, depreciation reserve, cost of removal, and salvage records on a going-forward basis;
4. Order no recovery of acquisition adjustment or acquisition premium in this case;
5. Require Transferee to file adoption notice tariff sheets, and revised index sheets, as a 30-day tariff filing, within 5 days after closing the asset transfer, and authorize Transferee, upon closing, to provide water service under the existing tariffs of Transferor on an interim basis until the effective date of such adoption notice tariff sheets;
6. On the effective date of the tariff sheets, cancel the Certificate granted to the Transferor for the provision of water service, and grant a Certificate to the Transferee for the provision of water service for the described service areas;
7. Require the Transferee to use the schedule of depreciation rates set out in the Staff's Attachment A to its Memorandum that were prescribed by the Commission and used by the Transferor, from the date of the transfer forward, until changed by any future order of the Commission;
8. Require Transferee to maintain utility plant records and all customer account records as acquired from Transferor, and to keep all books and records, including plant property records, in accordance with the Uniform System of Accounts as described in this memorandum; and
9. Make no finding that would preclude the Commission from considering the ratemaking treatment to be afforded any matters, including future expenditures by the Transferee, in any later proceeding.

¹ See Joint Stipulation of Non-Disputed Facts

The Office of the Public Counsel's Response

On July 19, the Office of the Public Counsel filed its response to Staff's recommendation. Public Counsel informs the Commission that the property on which the water supply wells are located is not owned by either applicant. Public Counsel further states that there is no documentation showing that Transferee will have legal access to the supply wells. Public Counsel therefore asserts that absent legal certainty that Transferee will have access to the supply wells, the transfer is detrimental to the public interest. Public Counsel also requests a hearing to address this concern.

Public Counsel also takes issue with Staff's proposed condition #4, above, concerning acquisition adjustments or acquisition premiums. Staff recommends that the Commission "[o]rders no recovery of acquisition adjustment or acquisition premium in this case." Public Counsel posits that the Commission should instead restrict this language to any acquisition premium; omitting acquisition adjustment.

Discussion

Section 4 CSR 240-2.117 allows the Commission to make determinations on the pleadings when it is not otherwise contrary to law or the public interest. Because there is no genuine issue as to material fact, the Commission has the discretion to hold a hearing but a hearing is not required.² The parties have filed legal briefs exhausting the issue of Transferee's legal access to the supply wells. A hearing on this issue is therefore unnecessary. The parties have also filed a Joint Stipulation of Non-Disputed Facts. The Commission herein adopts the agreed-upon facts and incorporates those facts by reference.

Additionally, through their pleadings,³ Public Counsel and Staff set out their disagreement on how acquisition adjustments and acquisition premiums should be treated in rate cases. Staff recommends that the Commission include in this order a statement that there will be no recovery of an acquisition premium or acquisition adjustment. Public Counsel posits that this statement should only address any "acquisition premium" not "acquisition adjustment." Although the parties have stated no more than conclusory statements on this issue, it is clear that there is an acquisition premium.⁴ The Commission will therefore restrict its language as suggested by Public Counsel.

The Commission appreciates Public Counsel's concern regarding property rights and agrees that Transferee's securing of legal access to the supply wells is in the public interest. However, Transferor has been an administratively dissolved corporation since 2010.⁵ Further, as shown on the Missouri Secretary of State's website, Transferor has, since 1996, been progressively irresponsible in its administrative duties.⁶ Although

² *State ex rel Laclede Gas Company v. Public Service Com'n of State*, S.W.3d 2012 WL 6129787, Mo. App. W.D. 2012.

³ See Paragraph 9 of The Office of the Public Counsel's Response to Staff Recommendation and Paragraph 9 of Staff's Response thereto. Item numbers 8 and 9 in the docket.

⁴ Paragraph 9, Joint Stipulation of Non-Disputed Facts.

⁵ Joint Application and The Missouri Secretary of State's website.

⁶ See History of Annual Report filings on the Missouri Secretary of State's website.

transferor is current with filing its Annual Reports with the Commission,⁷ it appears as though the owner has lost interest in operating the water company. The Commission must therefore act to approve this application to avoid foreseeable circumstances that may be adverse to the public interest.

The Applicants have complied with the Commission's filing requirements. The parties agree that Transferee has the managerial, technical and financial ability to operate the water system.⁸ Given that Transferor is an administratively dissolved corporation and is progressively lacking in its administrative duties, the Commission finds that it would be detrimental to the public interest to allow Transferor to continue providing service to the public. Conversely, it is in the public interest to immediately authorize the transfer of assets to Transferee, who is better able and apparently willing to provide such service.

However, in approving the transfer, the Commission will direct that Transferee act to secure legal rights to the property on which the supply wells are located and to file documents supporting its efforts and the securing of those rights in this case file.

Finally, Staff recommends that a Certificate of Convenience and Necessity be granted to Transferee upon the effective date of its tariff and that the Certificate held by Transferor be cancelled. However, the closing date of the transfer will precede the effective date of the tariff. During that interim period, Transferee will be operating without a Certificate from this Commission. The Commission will therefore condition the effectiveness of this transfer on Transferor having secured, through an application, a Certificate of Convenience and Necessity to operate a water company.

THE COMMISSION ORDERS THAT:

1. The transfer of assets from Moore Bend Water Company, Inc. to Moore Bend Water Utility, LLC is approved.
2. There will be no recovery of the acquisition premium.
3. Upon closing the asset transfer, Moore Bend Water Company, Inc. shall transfer to Moore Bend Water Utility, LLC, all books and records, including, but not limited to, purchase orders, invoices, contracts and agreements relating to its operation, drawings and blue prints of the water system, plant records, operations records, and expense records and all customers billing records.
4. Moore Bend Water Utility, LLC shall adopt the individual plant-in-service, and depreciation reserve utilized by the Audit Staff valued as of March 31, 2012, for purposes of determining the appropriate rate base in this proceeding as a starting point for plant-in-service, and depreciation reserve for Moore Bend Water Utility, LLC, to be recorded in its books and records, who shall maintain and retain proper plant-in-service depreciation reserve, cost of removal, and salvage records on a going-forward basis.
5. Moore Bend Water Utility, LLC shall file adoption notice tariff sheets, and revised index sheets, as a 30-day tariff filing, within 5 days after closing the asset transfer.
6. Moore Bend Water Utility, LLC shall use the schedule of depreciation rates set out in Attachment A to Staff's Memorandum.
7. Moore Bend Water Utility, LLC shall maintain utility plant records and all customer account records as acquired from Moore Bend Water Company and shall keep all books and records, including plant property records, in accordance with the Uniform System of Accounts as described in Staff's Memorandum.

⁷ Paragraph 4, Joint Stipulation of Non-Disputed Facts.

⁸ Paragraph 7, Joint Stipulation of Non-Disputed Facts.

8. In order to ensure access to its supply wells, Moore Bend Water Utility, LLC shall, within the next six months, secure legal rights to the property on which the supply wells are located.

9. Moore Bend Water Utility, LLC shall file documentation supporting its efforts to secure legal rights to its supply wells and documentation showing that it has successfully complied with the Commission's directive in ordered paragraph #8, above.

10. The authority to transfer assets granted in this order shall become effective concurrently with the effective date of an order from this Commission granting to Moore Bend Water Utility, LLC a Certificate of Convenience and Necessity.

11. This order shall become effective on May 4, 2013.

12. This case will remain open to facilitate Moore Bend Water Utility, LLC's filing of documentation concerning its legal right to access its supply wells.

R. Kenney, Chm., Jarrett, Stoll,
and W. Kenney, CC., concur.

Jones, Senior Regulatory Law Judge

**In the Matter of Union Electric Company d/b/a Ameren Missouri's Voluntary
a/b/a Ameren Missouri's Voluntary Green Program/Pure Power Program Tariff
Filing**

File No. EO-2013-0307

EVIDENCE, PRACTICE AND PROCEDURE

§26. Burden of proof

When seeking approval of a tariff, the proponent need not show that the resulting rate is just and reasonable if the tariff enacts a program in which consumers participate only voluntarily.

ELECTRIC

§20. Rates

Purchasing green power generated by a local utility has environmental benefits. Those benefits also accrue from purchasing renewable energy credits combined with grid electricity, which a proposed tariff offered customers the option of doing. The Commission approved that tariff subject to annual reporting.

Issue Date: April 24, 2013

Effective Date: May 1, 2013

APPEARANCES

Appearing for **UNION ELECTRIC COMPANY d/b/a AMEREN MISSOURI:**

Wendy K. Tatro, PO Box 66149, 1901 Chouteau Ave., St. Louis, Missouri 63103.

Appearing for the **OFFICE OF PUBLIC COUNSEL:**

Lewis R. Mills, Public Counsel, PO Box 2230, 200 Madison St., Ste. 650,
Jefferson
City, Missouri 65102-2230.

Appearing for the **STAFF OF THE MISSOURI PUBLIC SERVICE COMMISSION:**

Sarah Kliethermes, Senior Counsel, and **Jennifer Hernandez**, Senior
Counsel, PO Box 360, 200 Madison Street, Jefferson City, Missouri 65102.

REGULATORY LAW JUDGE: Michael Bushmann

REPORT AND ORDER

I. Procedural History

On October 19, 2012, Union Electric Company d/b/a Ameren Missouri ("Ameren Missouri") filed with the Missouri Public Service Commission ("Commission") tariff sheets bearing an effective date of May 1, 2013 revising its Voluntary Green Program/Pure Power Program ("Pure Power Program"). The tariff sheets were filed in relation to a Non- Unanimous Stipulation and Agreement filed in Ameren Missouri's previous rate case, ER-2012-0166. On November 20, 2012, the Commission's Staff filed a motion to open an investigation into the tariff sheets implementing the program.

The Commission subsequently granted Staff's motion and established a procedural schedule. On March 19, 2013, the Commission conducted an evidentiary hearing concerning the Pure Power Program.¹

II. Findings of Fact

Any finding of fact for which it appears that the Commission has made a determination between conflicting evidence is indicative that the Commission attributed greater weight to that evidence and found the source of that evidence more credible and more persuasive than that of the conflicting evidence. On March 12, 2013, the parties filed a *Joint Stipulation of Non-Disputed Material Facts*, which the Commission incorporates and adopts in its entirety as its own Findings of Fact.

1. Ameren Missouri is a Missouri corporation with its principal place of business at One Ameren Plaza, 1901 Chouteau, St. Louis, MO 63103. Ameren Missouri is engaged in the business of providing electric services in Missouri to customers in its service areas.²

2. Ameren Missouri is an "electrical corporation" and a "public utility" as those terms are defined in Section 386.020, RSMo Supp. 2012, and is subject to the jurisdiction and supervision of the Commission as provided by law.³

3. The Office of the Public Counsel ("Public Counsel") "may represent and protect the interests of the public in any proceeding before or appeal from the public service commission."⁴ Public Counsel "shall have discretion to represent or refrain from representing the public in any proceeding"⁵, and Public Counsel participated as a party in this matter.

4. The Staff of the Missouri Public Service Commission ("Staff") is a party in all Commission investigations, contested cases and other proceedings, unless it files a notice of its intention not to participate in the proceeding within the intervention deadline set by the Commission.⁶

5. On October 19, 2012, Ameren Missouri filed tariff sheets revising its Pure Power Program. Those tariff sheets bear an effective date of May 1, 2013.⁷

6. On November 20, 2012, the Staff filed a Motion to Open Investigation relating to Ameren Missouri's Pure Power Program and its tariff filing. The Staff's Motion arose out of a Stipulation and Agreement in Ameren Missouri's recently concluded general electric rate case, Case No. ER-2012-0166.⁸

¹ Transcript, Volumes 1-2. In total, the Commission admitted the testimony of three witnesses and received fifteen exhibits into evidence. Final post-hearing briefs were filed on April 15, 2013, and the case was deemed submitted for the Commission's decision on that date when the Commission closed the record. "The record of a case shall stand submitted for consideration by the commission after the recording of all evidence or, if applicable, after the filing of briefs or the presentation of oral argument." Commission Rule 4 CSR 240-2.150(1).

² *Joint Stipulation of Non-Disputed Material Facts*, paragraph 1.

³ *Joint Stipulation of Non-Disputed Material Facts*, paragraph 2.

⁴ Section 386.710(2), RSMo 2000; Commission Rules 4 CSR 240-2.010(10) and (15) and 2.040(2).

⁵ Section 386.710(3), RSMo 2000; Commission Rules 4 CSR 240-2.010(10) and (15) and 2.040(2).

⁶ Commission Rules 4 CSR 240-2.010(10) and (21) and 2.040(1).

⁷ *Joint Stipulation of Non-Disputed Material Facts*, paragraph 3.

⁸ *Joint Stipulation of Non-Disputed Material Facts*, paragraph 4.

7. By Order dated November 26, 2012, the Commission opened an investigation.⁹

8. Thereafter, Staff, Ameren Missouri and Public Counsel agreed upon a procedural schedule for the processing of this case. Staff and Ameren Missouri prefiled testimony in this matter.¹⁰

9. Electricity generated from renewable resources such as solar, wind, geothermal, small and low-impact hydropower, and biomass has proved to be environmentally preferable to electricity generated from conventional sources such as coal, oil, natural gas, and nuclear, which can have detrimental effects on human health and the environment through air emissions and other problems.¹¹

10. A renewable energy credit (“REC”) represents the property rights to the environmental, social and other non-power qualities of one megawatt hour of renewable energy generation. A REC can be sold separately from the underlying electricity generated by a renewable resource.¹²

11. The purchase of RECs combined with plain grid electricity is functionally equivalent to green power purchases from a local utility, no matter where the REC may be sourced.¹³

12. Under Ameren Missouri’s Pure Power Program, Ameren Missouri customers may voluntarily make payments to Ameren Missouri, who then purchases and retires RECs on the customer’s behalf. Ameren Missouri contracted with 3Degrees Group, Inc. d/b/a 3Degrees (“3Degrees”), which is not affiliated with Ameren Missouri, for 3Degrees to procure RECs for the Pure Power Program and to market and administer the program.¹⁴

13. Ameren Missouri has offered the Pure Power program since 2007¹⁵, and has averaged approximately 5,000 participants annually since its inception.¹⁶

14. Ameren Missouri maintains a website that provides customers information on the Pure Power Program and instructions on how to sign up for the Program.¹⁷ Ameren Missouri also provides information to the public concerning the Pure Power Program through the distribution of various marketing materials.¹⁸

15. Customers may also check a box on the customer’s bill to sign up for the Pure Power Program.¹⁹

16. As of February 2013, the language on the customer’s bill for the Pure Power Program reads: “Sign Up For *Pure Power* to support clean renewable energy in Missouri and the Midwest. By checking the box, a 1.5 cent per kilowatt hour charge will apply. You may cancel at any time.”²⁰

⁹ *Joint Stipulation of Non-Disputed Material Facts*, paragraph 5.

¹⁰ *Joint Stipulation of Non-Disputed Material Facts*, paragraph 6.

¹¹ Ameren Ex. 4, U.S. Department of Energy, *Guide to Purchasing Green Power*, March 2010, p. 2.

¹² *Joint Stipulation of Non-Disputed Material Facts*, paragraph 7.

¹³ Ameren Ex. 4, U.S. Department of Energy, *Guide to Purchasing Green Power*, March 2010, p. 10.

¹⁴ *Joint Stipulation of Non-Disputed Material Facts*, paragraph 8.

¹⁵ *Joint Stipulation of Non-Disputed Material Facts*, paragraph 10.

¹⁶ Ameren Ex. 1, Barbieri Direct, p. 6.

¹⁷ *Joint Stipulation of Non-Disputed Material Facts*, paragraph 18.

¹⁸ Transcript, Vol. 1, p. 46-48; Staff Ex.3; Staff Ex. 4.

¹⁹ *Joint Stipulation of Non-Disputed Material Facts*, paragraph 19.

²⁰ *Joint Stipulation of Non-Disputed Material Facts*, paragraph 20.

17. Ameren Missouri's customers who choose to participate in the Pure Power Program currently pay Ameren Missouri \$15 per REC. Ameren Missouri retains \$1 of that payment and 3Degrees receives the remaining \$14.²¹

18. Participating customers may purchase RECs in amounts equal to their electric usage in mega-watt hours (MWhs), or they may purchase a select number of RECs each month.²²

19. Customers who choose to participate in the Pure Power Program sign no contracts and may enter and exit the program at will with no penalties.²³

20. There are over 860 utilities offering a green pricing program option to customers across the country, and the design of Ameren Missouri's Pure Power Program is common among such utilities.²⁴

21. As part of the initial Pure Power Program tariff, Ameren Missouri retained \$1 of every \$15 collected in order to pay for up-front administrative costs, including a start-up fee to 3Degrees, computer programming costs, and other non-recurring costs. Under the revised Pure Power Program, Ameren Missouri will no longer have any continuing program costs and any future administrative costs to Ameren Missouri will be de minimis.²⁵

22. Ameren Missouri made a one-time, up-front payment to 3Degrees of \$300,000 when it began offering the Pure Power Program.²⁶

23. Under the current contract, as well as under the new contract, 3Degrees is required to acquire RECs, which come from either renewable resources in Missouri or from electricity that could be wheeled into Missouri.²⁷

24. Since 2009, 3Degrees has purchased all Pure Power RECs from renewable generators located in Missouri.²⁸ Currently, all of the RECs for the Pure Power Program are purchased from a single wind energy generator, Farmers City Wind Power Project ("Farmers City").²⁹

25. The Pure Power Program received the National New Green Power Program of the Year Award in 2008 from the U.S. Environmental Protection Agency, the U.S. Department of Energy, and the Center for Resource Solutions.³⁰

26. The Pure Power Program is Green-e Energy certified.³¹ This certification program has been offered since 1997 by the Center for Resource Solutions, which is a nonprofit organization whose mission is to develop policy and market solutions to advance sustainable energy.³²

²¹ *Joint Stipulation of Non-Disputed Material Facts*, paragraph 9.

²² Ameren Ex. 1, Barbieri Direct, p. 5.

²³ Ameren Ex. 2, Barbieri Surrebuttal, p. 13.

²⁴ Ameren Ex. 3, Martin Surrebuttal, p. 7.

²⁵ Ameren Ex. 2, Barbieri Surrebuttal, p. 6-7.

²⁶ *Joint Stipulation of Non-Disputed Material Facts*, paragraph 11.

²⁷ *Joint Stipulation of Non-Disputed Material Facts*, paragraph 14.

²⁸ *Joint Stipulation of Non-Disputed Material Facts*, paragraph 15.

²⁹ Transcript, Vol. 1, p. 59-60.

³⁰ Ameren Ex. 2, Barbieri Surrebuttal, p. 13.

³¹ Ameren Ex. 2, Barbieri Surrebuttal, p. 8.

³² Ameren Ex. 3, Martin Surrebuttal, p. 1.

27. Participants in the Green-e Energy certification program, such as Ameren Missouri, must adhere to the program's national standards, code of conduct, and customer disclosure requirements, which are approved by an independent board of environmental NGOs, renewable energy advocates, and renewable energy technology, market, and consumer protection experts.³³

28. Green-e Energy program requirements include providing specific types of information to consumers prior to their enrollment in the renewable energy option, complying with certain rules regarding marketing and claims, and completing an annual verification audit. Green-e Energy verifies through the annual audit that the renewable energy product is in fact provided to the customer in the quantity and of the quality described during enrollment, that there is no double counting or double selling of renewable energy, and that voluntary program sales are above and beyond any renewable energy procured by the utility to meet a law or regulation.³⁴

29. Under the new tariff sheets Ameren Missouri filed that initiated this case, Ameren Missouri's Pure Power Program would be modified so its customers could voluntarily pay \$10 per REC. Ameren Missouri would not retain any portion of the \$10. Ameren Missouri would then pay 3Degrees \$10 per REC subscribed to by Ameren Missouri's customers.³⁵

30. The only difference between the purpose clauses in the existing tariff and the proposed tariff is that a phrase in the first sentence has been changed from "...to provide customers with an option to contribute to the further development of renewable energy technologies", to the phrase "...to provide customers with an option to support renewable energy technologies and education through the purchase of renewable energy credits".³⁶

31. Under its new contract with 3Degrees, Ameren Missouri would pay 3Degrees \$10.00 per REC purchased by an Ameren Missouri customer.³⁷

32. Nine unregulated entities provide voluntary REC programs in Missouri and over 860 providers offer similar utility green pricing programs.³⁸ Of those other nine REC programs in Missouri, only one program costs less per kWh than the Pure Power Program.³⁹ The proposed \$10 charge per REC is within the range of costs of other voluntary green programs in the United States.⁴⁰

33. 3Degrees is not regulated by the Commission, and the Commission has no authority over 3Degrees.⁴¹

34. 3Degrees maintains the information regarding the cost of RECs and costs of 3Degrees administering the Pure Power Program.⁴²

³³ Ameren Ex. 3, Martin Surrebuttal, p. 2.

³⁴ Ameren Ex. 3, Martin Surrebuttal, p. 3-4.

³⁵ *Joint Stipulation of Non-Disputed Material Facts*, paragraph 13.

³⁶ Staff Ex. 1, Ensrud Rebuttal, p. 12.

³⁷ *Joint Stipulation of Non-Disputed Material Facts*, paragraph 12.

³⁸ *Joint Stipulation of Non-Disputed Material Facts*, paragraph 21.

³⁹ Staff Ex. 1, Ensrud Rebuttal, p. 5.

⁴⁰ Ameren Ex. 3, Martin Surrebuttal, p. 8; Transcript, Vol. 1, p. 83;

⁴¹ *Joint Stipulation of Non-Disputed Material Facts*, paragraph 16.

⁴² *Joint Stipulation of Non-Disputed Material Facts*, paragraph 17.

35. Ameren Missouri's witness, William J. Barbieri, testified credibly that rejecting the proposed tariff would kill the Pure Power Program, as it would prevent Ameren Missouri from including the program charge on its customers' bill, thereby significantly increasing the program costs and requiring participating customers to make a separate payment for their electric service and for RECs.⁴³

36. 3Degrees is a reputable company that has had its own REC product certified by Green-e Energy since 2002 and is involved in supporting six utility programs that are Green-e Energy certified, including the Pure Power Program.⁴⁴

37. In response to Staff's request for information concerning the price 3Degrees paid for RECs to Farmers City, the costs of customer education, and 3Degrees' administration costs, Ameren Missouri stated that it does not have this information after 2011.⁴⁵

38. Ameren Missouri asserts that under the new contract, 3Degrees is not contractually obligated to provide Ameren Missouri with information concerning the price 3Degrees paid for RECs to Farmers City or the administration costs incurred as part of the Pure Power Program.⁴⁶

39. Under the new contract with Ameren Missouri, 3Degrees is required to lock in the price charged to program participants for RECs at \$10 for the term of the contract, meaning that 3Degrees is taking the market risk by accepting future unknown pricing in order to provide consistent pricing to those participants.⁴⁷

40. Staff has recommended that the Commission impose a condition on the approval of the proposed tariff requiring Ameren Missouri to provide Staff with the annual distribution of Pure Power funds collected and percentage retained by Ameren Missouri, the percentage of such funds spent on advertising and administration by 3Degrees, and the percentage of such funds forwarded to Farmers City.⁴⁸

41. On April 19, 2013, Ameren Missouri filed a *Clarification of Reporting Offer*, which consented to Ameren Missouri annually providing the Commission with a highly confidential report showing the percentages of REC costs/fees, customer education/marketing costs, and administration costs for each \$10 charge for RECs during the previous calendar year.

⁴³ Ameren Ex. 2, Barbieri Surrebuttal, p. 4-5.

⁴⁴ Ameren Ex. 3, Martin Surrebuttal, p. 9.

⁴⁵ Staff Ex. 6; Staff Ex. 7.

⁴⁶ Staff Ex. 7; Transcript, Vol. 1, p. 60-63.

⁴⁷ Ameren Ex. 2, Barbieri Surrebuttal, p. 5-6.

⁴⁸ Staff Ex. 1, Ensrud Rebuttal, p. 4.

III. Conclusions of Law

Ameren Missouri is an electrical corporation and a public utility, as those terms are defined by Section 386.020(15) and (43), RSMo 2000. As such, the Commission has jurisdiction over Ameren Missouri pursuant to Sections 386.250(1), RSMo 2000, and 393.140, RSMo 2000. The voluntary customer charge contemplated for the Pure Power Program constitutes a “rate” as broadly defined in Section 386.020(46), RSMo Supp. 2012.⁴⁹ As with any rate request, the burden of proof is on Ameren Missouri to show that the proposed rate is just and reasonable.⁵⁰ In order to carry its burden of proof, Ameren Missouri must meet the preponderance of the evidence standard,⁵¹ and must convince the Commission it is “more likely than not” that Ameren Missouri’s proposed rate adjustment is just and reasonable.⁵² The Commission has the discretion to determine which facts are relevant to reach a conclusion on the reasonableness of a proposed rate.⁵³

The Commission must first decide whether what is reasonable for a voluntary program can be different than what is reasonable for a mandatory rate for electric service. The facts of this case are quite different than a normal rate case fixing the price to be charged for electricity, since under the proposed tariff Ameren Missouri will receive none of the \$10 per REC charged to the customers who sign up for the program. The money collected is passed through to 3Degrees for the purchase of RECs and the payment of administrative costs. While Ameren Missouri may receive some non-monetary benefit from the program, the usual issues of operating expenses, debt service, dividends, investor compensation, capital attraction, and financial integrity are not applicable here. Staff and Public Counsel want to impose the same level of scrutiny to this tariff through the audit process as is applied in regular rate cases, but Ameren Missouri argues that less rigorous regulation is required because of the nature of this voluntary program. The fact that the parties removed this issue from the consideration of all issues in Ameren Missouri’s most recent general rate case and agreed to resolve the dispute separately suggests that they recognized the charge under the Pure Power Program was a different type of rate.⁵⁴

⁴⁹ “‘Rate’, every individual or joint rate, fare, toll, charge, reconsigning charge, switching charge, rental or other compensation of any corporation, person or public utility, or any two or more such individual or joint rates, fares, tolls, charges, reconsigning charges, switching charges, rentals or other compensations of any corporation, person or public utility or any schedule or tariff thereof.”

⁵⁰ Section 393.150.2, RSMo 2000.

⁵¹ *Bonney v. Environmental Engineering, Inc.*, 224 S.W.3d 109, 120 (Mo. App. 2007); *State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 548 (Mo. banc 2003); *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104, 110 (Mo. banc 1996), citing to, *Addington v. Texas*, 441 U.S. 418, 423, 99 S.Ct. 1804, 1808, 60 L.Ed.2d 323, 329 (1979).

⁵² *Holt v. Director of Revenue, State of Mo.*, 3 S.W.3d 427, 430 (Mo. App. 1999); *McNear v. Rhoades*, 992 S.W.2d 877, 885 (Mo. App. 1999); *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104, 109-111 (Mo. Banc 1996); *Wollen v. DePaul Health Center*, 828 S.W.2d 681, 685 (Mo. banc 1992).

⁵³ Section 393.270.4, RSMo 2000, states, in part, that “[i]n determining the price to be charged for gas, electricity, or water the commission may consider all facts which in its judgment have any bearing upon a proper determination of the question ...” Arguably, the Commission need not even consider all relevant factors, as the voluntary charge at issue is not the price to be charged to customers for their electricity.

⁵⁴ Ameren Ex. 6, *Nonunanimous Stipulation and Agreement Regarding Ameren Missouri’s Voluntary Green Program*, ER-2012-0166.

The Commission concludes that there is a difference between a charge for a voluntary program, such as the Pure Power Program, and a mandatory rate charged to customers for their electricity, and they should be treated differently. What is reasonable for a voluntary program is not necessarily the same as what is reasonable for a mandatory rate. Staff argues that it has not yet received sufficiently detailed information to perform an audit. Staff believes that without that information it cannot adequately evaluate the program, and the Commission cannot determine the reasonableness of the proposed tariff. The Commission concludes that a full audit is not necessary under these particular circumstances. The record in this case has provided adequate evidence regarding the voluntariness of the program, the amount of money required to participate, the requirement of an administration fee, any safeguards to protect consumers, how the program is priced relative to other comparable jurisdictions and public utilities, the costs and benefits of the program, and whether the program furthers the policy goal of encouraging renewable energy. The Commission determines that these are important facts to consider in relation to the reasonableness of the proposed Pure Power Program tariff. While the additional audit information that Staff seeks would be beneficial, Ameren Missouri's failure to produce that detailed information under the particular circumstances of this voluntary program is not fatally defective. The Commission concludes that it has sufficiently considered all relevant factors in rendering a decision on whether to approve the proposed tariff.

In determining whether a rate is just and reasonable, the U.S. Supreme Court has stated that "[w]hat annual rate will constitute just compensation depends upon many circumstances, and must be determined by the exercise of a fair and enlightened judgment, having regard to all relevant facts."⁵⁵ The Court has also stated that public utility commissions are "not bound to the use of any single formula or combination of formulae in determining rates," and that ratemaking "involves the making of 'pragmatic adjustments'".⁵⁶

Staff has opposed the Pure Power Program in the past and attempted to convince the Commission to discontinue that program.⁵⁷ However, the Commission has consistently disagreed with Staff's position and concluded that the purchase of RECs effectively stimulates demand for renewable energy; that previous disputes about program marketing materials did not justify terminating the program; that the amount of collected money used to purchase RECs was reasonable, considering that 3Degrees carried the market risk during the contract term; that Ameren Missouri's non-participating customers were not subsidizing Ameren Missouri's administrative program costs; and that the program was nationally respected and popular with some of Ameren Missouri's customers.⁵⁸ Despite the Commission's previous statements of approval concerning the Pure Power Program, Staff has now objected to the revised program and made substantially the same arguments to reject that proposed tariff.

⁵⁵ *Bluefield Waterworks & Improvement Co. v. Public Service Commission of West Virginia*, 262 U.S. 679, 692-93, 43 S.Ct. 675, 67 L.Ed. 1176 (1923).

⁵⁶ *Fed. Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 602, 64 S. Ct. 281, 88 L. Ed. 333 (1944).

⁵⁷ Report and Order, *In the Matter of Union Electric Company d/b/a AmerenUE's Tariffs Increasing Rates for Electric Service Provided to Customers in the Company's Missouri Service Area*, issued May 22, 2007, 257 P.U.R.4th 259, 312-313, 2007 WL 1597782 (Mo.P.S.C.); Ameren Ex. 5, Report and Order, *In the Matter of Union Electric Company d/b/a AmerenUE's Tariffs to Increase Its Annual Revenues for Electric Service*, issued January 27, 2009, 271 P.U.R.4th 475, 526-527, 2009 WL 248216 (Mo.P.S.C.).

⁵⁸ Ameren Ex. 5, Report and Order, *In the Matter of Union Electric Company d/b/a AmerenUE's Tariffs to Increase Its Annual Revenues for Electric Service*, issued January 27, 2009, 271 P.U.R.4th 475, 526-527, 2009 WL 248216 (Mo.P.S.C.).

The Commission finds Staff's arguments to be unpersuasive. The Commission concludes that its previous determinations regarding the Pure Power Program are still valid and that the revised program is a reasonable plan to encourage the use of renewable energy. The Pure Power Program is completely voluntary, and its participants can enter and leave the program at any time without penalty. The charge to participate is reduced substantially under the proposed revisions, and is inexpensive compared to similar programs in Missouri and other states. Ameren Missouri will no longer be collecting any charge for administrative costs, and any future administrative costs to it will be de minimis. 3Degrees continues to bear the market risk regarding the price of RECs. The program also contains significant safeguards to protect consumers. The Green-e Energy certification program requires adherence to national standards, a code of conduct, customer disclosure requirements, and an annual audit process. The language used in the proposed tariff and various Ameren Missouri marketing materials regarding the Pure Power Program is not inaccurate or misleading.

The Commission also concludes that the Pure Power Program furthers the policy goal of encouraging renewable energy. Renewable energy generation provides a direct benefit to the public because it can reduce the problems associated with conventional sources of electricity, such as coal, oil, natural gas, and nuclear. Staff argues that the purchase of RECs does not constitute the use of renewable energy, but Ameren Missouri presented credible evidence from the U.S. Department of Energy that the purchase of RECs combined with grid electricity is the functional equivalent to green power purchases from a local utility. Regardless of whether the purchase of RECs and the purchase of energy from a renewable energy generator are the same or different, both are beneficial in the promotion and support of renewable energy. While the Commission highly encourages renewable energy generation, it acknowledges that programs such as the Pure Power Program can also provide a benefit to the public by supporting renewable energy.

Staff has suggested that several conditions be imposed upon Ameren Missouri should the Commission decide not to reject the proposed tariff, including the requirement to provide Staff with the annual distribution of Pure Power funds collected and percentage retained by Ameren Missouri, the percentage of such funds spent on advertising and administration by 3Degrees, and the percentage of such funds forwarded to Farmers City. Ameren Missouri has consented to annually providing the Commission with a highly confidential report showing the percentages of REC costs/fees, customer education/marketing costs, and administration costs for each \$10 charge for RECs during the previous calendar year. The Commission determines that this one condition is reasonable to provide additional safeguards that the funds from Pure Power program participants are being used appropriately. The Commission also recognizes that public disclosure of this proprietary business information could be detrimental to 3Degrees and Farmers City, so the Commission will require that any such information provided to the Commission be treated as highly confidential.

Ameren Missouri has requested that the Commission approve the contract between it and 3Degrees, but the Commission concludes that approval of the contract is not necessary in order to determine whether to approve the tariff and, therefore, declines to do so at this time. The Commission will also deny Ameren Missouri's motion to strike the amicus curiae brief of Renew Missouri.

V. Decision

In making this decision, the Commission has considered the positions and arguments of all of the parties. After applying the facts to the law to reach its conclusions, the Commission concludes that the substantial and competent evidence in the record supports the conclusion that Ameren Missouri has met, by a preponderance of the evidence, its burden of proof to demonstrate that its proposed tariff is just and reasonable. Ameren Missouri's tariff sheets will be approved.

THE COMMISSION ORDERS THAT:

1. The following tariff sheets filed by Union Electric Company d/b/a Ameren Missouri on October 19, 2012, assigned tariff tracking number JE-2013-0197, are hereby approved to become effective on May 1, 2013:

Mo. P.S.C. Schedule No. 5

Original Sheet No. 217.1

Original Sheet No. 217.2

2. No later than April 15 of each year, Union Electric Company d/b/a Ameren Missouri shall provide to the Commission a report showing the percentages of REC costs/fees, customer education/marketing costs, and administration costs for each \$10 charge for RECs during the previous calendar year. The first such report submitted shall be filed no later than April 15, 2014 for the period from May 1, 2013 through December 31, 2013. The Commission shall treat any such report provided as highly confidential.

3. Union Electric Company d/b/a Ameren Missouri's motion to strike the amicus curiae brief of Renew Missouri is denied.

4. This report and order shall become effective on May 1, 2013.

5. This file shall close on May 2, 2013.

R. Kenney, Chm., Jarrett, Stoll, and
W. Kenney, CC., concur and certify
compliance with the provisions of
Section 536.080, RSMo.

Bushmann, Regulatory Law Judge

In the Matter of the Application of Summit Natural Gas of Missouri, Inc., for a Certificate of Convenience and Necessity Authorizing it to Construct, Install, Own, Operate, Control, Manage and Maintain a Natural Gas Distribution System to Provide Gas Service in Pettis County and Benton County, Missouri as a New Certificated Area

File No. GA-2013-0404

CERTIFICATES

§13. Extension and changes

§21. Grant or refusal of certificate generally

§43. Gas

The Commission granted a certificate of convenience and necessity for a gas company to expand its service area subject to separate accounting for the expansion and the filing of revised tariffs.

ORDER GRANTING CERTIFICATE OF CONVENIENCE AND NECESSITY

Issue Date: May 1, 2013

Effective Date: May 11, 2013

On February 27, 2013, Summit Natural Gas of Missouri, Inc. ("SNG") filed an application requesting that the Missouri Public Service Commission ("Commission") grant it a Certificate of Convenience and Necessity to expand its service territory into Sections W ½ 5, 8-10 in Township 43 North, Range 23 West in Pettis County, Missouri, and Sections 15, 16, 17, 20, 21, 28, 29, 32, and 33 in Township 43 North, Range 23 West in Benton County, Missouri.¹ This area is adjacent to SNG's existing certificated service area. The CCN would permit SNG to provide service to additional persons in those areas who may wish to obtain natural gas service.

The Commission issued notice and set a deadline for intervention requests. No person or entity intervened, and no party requested a hearing. On April 18, 2013, the Commission's Staff filed its recommendation to grant the CCN subject to certain conditions. On April 22, 2013, SNG filed a response stating that it has no objections to the conditions outlined in Staff's recommendation.

SNG is a "gas corporation" and a "public utility" as defined in Subsections 386.020(18) and (43), RSMo 2000. It is subject to the jurisdiction of this Commission under Chapters 386 and 393, RSMo 2000. A gas corporation may not exercise any right under a franchise without first obtaining the permission and approval of this Commission.² The Commission may give permission and approval when it has determined after due hearing³ that such construction or the exercise of such right under a franchise is "necessary or convenient for the public service."⁴ The Commission may also impose such conditions as it deems reasonable and necessary upon its grant of permission and approval.⁵

¹ SNG filed its application pursuant to Section 393.170, RSMo 2000, and Commission Rules 4 CSR 240-2.060 and 3.205.

² Section 393.170, 1 and 2, RSMo 2000.

³ The requirement for a hearing is met when the opportunity for hearing is provided and no proper party requests the opportunity to present evidence. No party requested a hearing in this matter; thus, no hearing is necessary. *State ex rel. Deffenderfer Enterprises, Inc. v. Public Service Comm'n of the State of Missouri*, 776 S.W.2d 494 (Mo. App. W.D. 1989).

⁴ Section 393.170.3, RSMo 2000.

⁵ *Id.*

The Commission has articulated the filing requirements for gas utility CCNs in Commission Rule 4 CSR 240-3.205, and the specific criteria to be used when evaluating applications of gas utility CCNs are more clearly set out in the case *In Re Intercon Gas, Inc.*, 30 Mo P.S.C. (N.S.) 554, 561 (1991). The *Intercon* case combined the standards used in several similar certificate cases, and set forth the following criteria: (1) there must be a need for the service; (2) the applicant must be qualified to provide the proposed service; (3) the applicant must have the financial ability to provide the service; (4) the applicant's proposal must be economically feasible; and (5) the service must promote the public interest.⁶

The Commission's Staff recommended approval of SNG's application because: (1) granting the application would be in the public interest; (2) SNG's proven ability to attract and secure financing for prior expansions indicates the project is feasible; (3) no persons have intervened or objected; (4) SNG anticipates using customary rights-of-way; (5) the requested service area is expected to develop new customers; and (6) no new franchises are necessary. SNG's verified application demonstrates a need for natural gas service in the service area identified.

Staff's recommendation is subject to SNG complying with the following conditions, to which SNG has consented:

1. SNG has the operational capability to provide gas service in its requested service area;
2. The requested CCN area for gas service would not jeopardize natural gas service to the Company's current customers;
3. SNG's shareholders are totally responsible for the success of this project, with no liability or responsibility put on customers;
4. SNG shall keep separate books and records for the proposed service area;
5. SNG shall file separate class cost of service studies and revenue requirements for each SNG tariffed area when SNG files its next rate case request;
6. The Pettis and Benton system must support the rate structure on a stand-alone-basis;
7. The Pettis and Benton County system's Allowance for Funds Used during Construction (AFUDC) rate shall use 10 percent as the common equity in its calculation;
8. SNG shall not capitalize any portion of its sales advertising and promotion payroll for this Company;
9. SNG shall use the same operation and maintenance expense (O & M) expense ratio for payroll that they agreed upon in the MGU rate case, Case Number GR-2008-0060 Unanimous Stipulation and Agreement for Pettis and Benton County's first rate case, unless the Company can demonstrate through timesheets and time reporting that some other ratio is more appropriate;
10. SNG shall use the depreciation rates currently on file with the Commission; and

⁶ Report and Order, *In re Application of Tartan Energy Company, L.C., d/b/a Southern Missouri Gas Company, for a Certificate of Convenience and Necessity*, Case No. GA-94-127, 3 Mo. P.S.C. 3d 173 (September 16, 1994), 1994 WL 762882, *3 (Mo. P.S.C.).

11. SNG shall obtain adequate capacity on the pipeline to reliably serve all customers in this area, including capacity necessary to serve any future growth.

Based on the Commission's independent and impartial review of the verified filings, the Commission determines that SNG has satisfied all necessary criteria for the grant of a CCN. SNG's provision of natural gas service to the service areas described is in the public interest and the Commission will grant the request for the certificate. Since SNG has not objected to Staff's recommended conditions, and because the Commission finds the conditions to be in the public interest, the Commission will incorporate the conditions into the ordered paragraphs below.

THE COMMISSION ORDERS THAT:

1. Summit Natural Gas of Missouri, Inc. is granted a Certificate of Convenience and Necessity to expand its service territory into Sections W ½ 5, 8-10 in Township 43 North, Range 23 West in Pettis County, Missouri, and Sections 15, 16, 17, 20, 21, 28, 29, 32, and 33 in Township 43 North, Range 23 West in Benton County, Missouri, as more specifically described in its application and subject to Staff's conditions as delineated in the body of this order.
2. Summit Natural Gas of Missouri, Inc. shall file revised tariff sheets including the newly certificated service areas granted by this order within thirty (30) days of the issue date.
3. This order shall become effective on May 11, 2013.
4. This file may be closed on May 12, 2013.

R. Kenney, Chm., Jarrett, Stoll,
and W. Kenney, CC., concur.

Bushmann, Regulatory Law Judge

In the Matter of the Application of Union Electric Company, d/b/a Ameren Missouri, for a Certificate of Convenience and Necessity Authorizing it to Construct, Install, Own, Operate, Control, Manage and Maintain a Sub-Transmission Line to Provide Electric Service in Clay County, Missouri

File No. EA-2013-0316

CERTIFICATES

§33. Immediate need for the service

§42. Electric and power

The Commission approves an application for a certificate of convenience and necessity for a sub-transmission line to a new customer's business site.

EVIDENCE, PRACTICE AND PROCEDURE

§22. Parties

Terms and conditions of union membership are not subject to the Commission's authority and therefore do not support an application to intervene out of time.

**ORDER VACATING PREVIOUS ORDER AND GRANTING NEW
CERTIFICATE OF CONVENIENCE AND NECESSITY**

Issue Date: May 21, 2013

Effective Date: June 20, 2013

Procedural history

On November 29, 2012, Union Electric Company d/b/a Ameren Missouri ("Ameren Missouri") filed an application with the Missouri Public Service Commission ("Commission") for a Certificate of Convenience and Necessity ("CCN") to construct, install, own, operate, control, manage and maintain an electric sub-transmission line to provide electric service in Clay County, Missouri, for a new customer locating to Ameren Missouri's existing territory. The proposed electric line would have total length of approximately 12,020 feet, but about 885 feet of that line would pass through the certificated service territory of KCP&L Greater Missouri Operations Company ("GMO"). GMO was granted leave to intervene on December 17, 2012. On December 17, 2012, the Commission's Staff filed a recommendation that advised the Commission to approve the application. The ten-day period to respond to that filing has elapsed, and GMO has not objected to Staff's recommendation. The International Brotherhood of Electrical Workers Locals 2 and 1439,1455, AFL-CIO, ("IBEW") filed a motion to intervene on December 28, 2012. On January 3, 2013, the Commission issued an *Order Granting Certificate of Convenience and Necessity*, which granted Ameren Missouri's application. That order became effective on January 4, 2013.

On March 15, 2013, a number of landowners impacted by the proposed sub-transmission line filed complaints with the Commission in File Nos. EC-2013-0420 and EC-2013-0421, requesting that the Commission hear their complaints or, in the alternative, re-open this case to take their testimony and evidence. The landowners allege that they did not receive notice of Ameren Missouri's application for a CCN and that the previously approved CCN would directly impair and impact their property. Ameren Missouri and the landowners are involved in an eminent domain proceeding currently pending in Clay County Circuit Court. The Commission will provide an opportunity for the landowners to file an application for rehearing in this case under Section 386.500, RSMo 2000.

Previous order granting CCN

The Commission's *Order Granting Certificate of Convenience and Necessity*, issued on January 3, 2013, was issued in error because it contained a 1-day effective date.¹ The Commission has the legal authority to modify or vacate its orders.² The Commission will vacate the previous order issued in error and re-issue the same order herein with a new effective date.

Ameren Missouri's CCN application

Ameren Missouri is an "electrical corporation" and a "public utility" as defined in Subsections 386.020(15) and (43), RSMo (Supp. 2011). It is subject to the jurisdiction of this Commission under Chapters 386 and 393, RSMo 2000. An electrical corporation may not exercise any right under a franchise without first obtaining the permission and approval of this Commission.³ The Commission may give permission and approval when it has determined after due hearing⁴ that such construction or the exercise of such right under a franchise is "necessary or convenient for the public service."⁵ The Commission may also impose such conditions as it deems reasonable and necessary upon its grant of permission and approval.⁶

In *Harline v. Public Service Commission of Missouri*, 343 S.W.2d 177, 184 (Mo. App. 1960), the court held that a public utility was not required to obtain an additional certificate of convenience and necessity to construct a transmission line within a territory already allocated to it. Therefore, Ameren Missouri is only required to seek authority for the 885 feet of transmission line that it seeks to build outside its certificated service territory.

In its recommendation, Staff states that the new electric sub-transmission line is necessary because Ameren Missouri is currently unable to deliver the requisite amount of power to its new customer's business site. Granting the application is in the public interest because it will bring approximately 155 jobs to the area. In addition, ratepayers should not be harmed by the transaction, since Ameren Missouri's tariff requires that the new customer provide a letter of credit that could be attached if the revenue flow from the customer is less than anticipated.

¹ See, *State ex rel. Office of Public Counsel v. Public Service Commission*, 236 S.W.3d 632 (Mo. banc 2007).

² Section 386.490.2, RSMo Supp. 2012, "Every order or decision of the commission shall of its own force take effect and become operative thirty days after the service thereof, except as otherwise provided, and shall continue in force either for a period which may be designated therein or until changed or abrogated by the commission, unless such order be unauthorized by this law or any other law or be in violation of a provision of the constitution of the state or of the United States." (emphasis added)

³ Section 393.170, 1 and 2, RSMo 2000.

⁴ The requirement for a hearing is met when the opportunity for hearing is provided and no proper party requests the opportunity to present evidence. No party requested a hearing in this matter; thus, no hearing is necessary. *State ex rel. Deffenderfer Enterprises, Inc. v. Public Service Comm'n of the State of Missouri*, 776 S.W.2d 494 (Mo. App. W.D. 1989).

⁵ Section 393.170.3, RSMo 2000.

⁶ *Id.*

On December 28, 2012, IBEW sought late intervention. The reason provided for being late was the inability to contact legal counsel, which the Commission considers to be good cause for the late filing. Commission Rule 4 CSR 240-2.075(3) provides that the Commission may grant a motion to intervene if the proposed intervenor “has an interest which is different from that of the general public and which may be adversely affected by a final order arising from the case.” The interest that IBEW asserts it is representing is its concern over the terms and conditions of its members’ employment. However, the Commission’s decision cannot, by statute, affect the terms and conditions of IBEW’s members.⁷ Since IBEW’s expressed interests would not be adversely affected by a final order, intervention is not appropriate and will be denied.

Based on the Commission’s independent and impartial review of the verified application and the verified recommendation of Staff, the Commission finds that granting Ameren Missouri’s application for a certificate of convenience and necessity would serve the public convenience and necessity. Therefore, the application will be granted.

THE COMMISSION ORDERS THAT:

1. The Commission’s *Order Granting Certificate of Convenience and Necessity*, issued on January 3, 2013 and effective on January 4, 2013, is vacated.
2. The International Brotherhood of Electrical Workers Locals 2 and 1439,1455, AFL-CIO’s late application to intervene is denied.
3. Union Electric Company d/b/a Ameren Missouri is granted permission, approval, and a certificate of convenience and necessity to construct, install, own, operate, control, manage and maintain an electric sub-transmission line to provide electric service in Clay County, Missouri, as more particularly described in its application.
4. Nothing in this order shall be considered a finding of the Commission of the reasonableness of the expenditures herein involved, the value for ratemaking purposes of the facilities herein involved, or as acquiescence in the value placed upon those facilities by Union Electric Company d/b/a Ameren Missouri. Furthermore, the Commission reserves the right to consider the ratemaking treatment to be afforded these expenditures in any later proceeding.
5. The Commission’s Data Center is directed to send a copy of this order to the parties of record in File Nos. EC-2013-0420 and EC-2013-0421.
6. This order shall become effective on June 20, 2013.

R. Kenney, Chm., Jarrett, Stoll, and
W. Kenney, CC., concur.

Bushmann, Regulatory Law Judge

⁷ Section 386.315, RSMo 2000.

Tari Christ d/b/a ANJ Communications, et al., Complainants, v. Southwestern Bell Telephone Company, L.P. d/b/a Southwestern Bell Telephone Company, Respondent.

Case No. TC-2005-0067

TELECOMMUNICATIONS

§7. Jurisdiction and powers of the State Commission

A complaint charged a local exchange telecommunications company with setting unlawful payphone rates, but a statutory amendment eliminated the Commission's authority to regulate prices between a local exchange telecommunications company and payphone providers, so the Commission dismissed the complaint.

§24. Procedures, evidence and proof

The Commission may approve a tariff without convening a contested case.

§24. Procedures, evidence and proof

Other than in a decision in a contested case, the Commission need not separately state its findings of fact.

§27. Finality and conclusiveness

The Commission's decision is subject to judicial review, but not collateral attack.

§7. Jurisdiction and powers of the State Commission

The Commission has no authority to order refunds from a local exchange telecommunications company to payphone providers.

ORDER REGARDING AT&T MISSOURI'S MOTION TO DISMISS

Issue Date: June 5, 2013

Effective Date: July 5, 2013

This complaint has been pending since August 27, 2004, when the Complainants, a group of payphone service providers, filed a complaint against Southwestern Bell Telephone Company, L.P. d/b/a Southwestern Bell Telephone Company. (Southwestern Bell Telephone Company now does business as AT&T Missouri and will be referred to as such in this order.) The Complainants and AT&T Missouri agreed to mediation in 2004, and the Commission stayed these proceedings to allow meditation to proceed. Despite periodic prodding from the Commission, this complaint remained stayed for mediation until July 28, 2011, when the Commission ended the stay of proceedings and ordered AT&T Missouri to file its answer.

The Complainants asked the Commission to reconsider its order directing AT&T Missouri to file its answer, explaining that proceedings on the complaint should remain suspended while the parties awaited guidance from an anticipated ruling from the Federal Communications Commission (FCC). At the Complainant's urging, the Commission reconsidered its order and further suspended these proceedings to await a ruling from the FCC.

On February 26, 2013, the Commission denied the Complainant's request for a further suspension and ordered AT&T Missouri to file its answer by April 1, 2013. Coincidentally, the FCC released its long-awaited order on February 27, 2013.¹ AT&T Missouri filed its answer, accompanied by a motion to dismiss, on April 1, 2013. At the Commission's direction, Staff and the Complainants responded to the motion to dismiss on April 30, 2013. AT&T Missouri replied on May 20, 2013.

¹ Despite the long wait for the FCC to issue the order, nothing in that order is dispositive of this complaint.

AT&T Missouri's motion to dismiss asks the Commission to dismiss the complaint on the pleadings. In deciding such a motion, the Commission must decide "whether the moving party is entitled to judgment as a matter of law on the face of the pleadings"² That means the well pleaded facts of the non-moving party's pleading are accepted as true for purposes of the motion.³ Thus, in deciding AT&T Missouri's motion, the Commission must accept the factual allegations of the complaint as true. It is also important to remember that the motion to dismiss currently before the Commission is not a motion for summary determination. For that reason, the Commission cannot consider factual allegations outside the four corners of the pleadings.

Before examining AT&T Missouri's motion to dismiss, the Commission must first consider the details of the complaint. The Complainants are a group of competitive independent payphone service providers who are either present or prospective customers of network services including payphone access line service and other associated services that are offered under rates, terms and conditions set forth in AT&T Missouri's tariffs. The complaint alleges that in 1996 Congress amended the Federal Communications Act to promote competition in the public payphone field. In particular, 47 U.S.C. §276 imposes certain restrictions on Bell operating companies, such as AT&T Missouri, to prevent them from subsidizing or discriminating in favor of their own payphone services.

One of the restrictions placed on Bell operating companies is a requirement that network services made available to payphone providers be provided at rates that comply with the New Services Test pricing formula as established by Federal regulations at 47 C.F.R. §61.49. In implementing that regulation, the FCC required the Bell operating companies to submit tariffs for basic payphone service to the appropriate state commissions for approval. AT&T Missouri submitted payphone service tariffs to this Commission and the Commission approved those tariffs in Case No. TT-97-345, to be effective on April 15, 1997.

The Complainants assert that there has been a substantial change in circumstances since the Commission approved AT&T Missouri's payphone tariffs. In particular, they assert that subsequent interpretations of the New Services Test set forth by the FCC call into doubt whether the AT&T Missouri tariffs that the Commission approved in 1997 comply with that test. The Complainants assert that since those tariffs do not comply with the New Services Test, the payphone rates charged by AT&T Missouri since 1997 are unjust and unreasonable and are above what is allowed by applicable law. They ask the Commission to set new rates for AT&T Missouri's payphone services. Further they ask the Commission to order AT&T Missouri to calculate the difference between the old and new payphone rates and refund the difference, with interest, to the Complainants.

AT&T Missouri's motion to dismiss asserts multiple grounds upon which the Commission should dismiss the complaint. The Commission will address two of those grounds in detail as together they are dispositive. The first ground asserted by AT&T Missouri is that the Commission no longer has authority under either federal or state law to set the rates the company may charge its payphone customers.

² *Ocello v. Koster*, 354 S.W.3d 187, 197 (Mo. 2011), citing *RGB2, Inc. v. Chestnut Plaza, Inc.* 103 S.W.3d 420, 424 (Mo. App. 2003).

³ *Ocello v. Koster*, at 197.

AT&T Missouri points out that the foundation of the Complainants claim is 47 U.S.C. 276. That section of the federal statutes is designed to prevent Bell operating companies, such as AT&T Missouri, from subsidizing their own payphone service or otherwise discriminating against independent payphone providers. As the Complainants explain in their complaint, the requirement that AT&T Missouri's payphone rates comply with the New Services Test pricing formula is founded on section 276.⁴ AT&T Missouri now asserts that it has not provided its own payphone service since at least 2010 and therefore the Commission no longer has authority to adjudicate the complaint under federal law.⁵

AT&T Missouri's argument may be correct, but the Commission has no basis for considering that argument for purposes of the current motion to dismiss the complaint on the pleadings. For purposes of the motion to dismiss, the Commission is only evaluating whether the complaint is sufficient to state a claim that the Commission can address. At this point, there is no evidence before the Commission that would establish as a fact that AT&T Missouri no longer provides its own payphone service. Indeed, for purposes of considering the motion to dismiss, the Commission must presume that the Complainant's allegation to the contrary is true. As a result, AT&T Missouri's argument that it is no longer subject to 47 U.S.C. 276 cannot be the basis for the dismissal of the complaint.

AT&T Missouri also argues that the Commission no longer has authority to set AT&T Missouri's payphone rates because of changes in Missouri law. The Commission takes administrative notice of the fact that AT&T Missouri is currently a competitive company for purposes of regulation by this Commission.⁶ Missouri law provides:

If the services of an incumbent local exchange telecommunications company are classified as competitive under this subsection, the local exchange telecommunications company may thereafter adjust its rate for such competitive services upward or downward as it determines appropriate in its competitive environment, upon filing tariffs which shall become effective within the time lines identified in section 392.500.⁷

Thus, under Missouri law, the Commission no longer has authority to order AT&T Missouri to charge a particular rate for its competitive services, including its payphone services.

The second ground AT&T Missouri asserts as a basis for dismissing the complaint is its claim that the Complainants have no legal right to challenge the validity of AT&T Missouri's existing payphone rates. Furthermore, AT&T Missouri asserts that even if the Commission were to find those rates to be invalid, it has no authority to order refunds as requested by the Complainants.

⁴ Complaint, Paragraphs 36-37.

⁵ Motion to Dismiss, Paragraph 6.

⁶ *In the Matter of Southwestern Bell Telephone Company, d/b/a AT&T Missouri's Application for a Commission Finding that 55% of AT&T Missouri's Total Subscriber Access Lines are in Exchanges Where Its Services have been Declared Competitive.* Declaration of Competitive Status, File No. TO-2009-0063, Issued November 26, 2008.

⁷ Section 392.245.5(6), RSMo (Supp. 2012). Under Section 392.500 RSMo (Supp. 2012), tariff filings that would decrease rates are effective on one day's notice to the Commission. Tariff filings to increase rates require ten-day's notice.

AT&T Missouri's current payphone rates were established by tariff, effective on April 15, 1997. The Commission approved those tariffs in an order issued on April 11, 1997.⁸ Missouri law regarding the effect of utility tariffs is quite clear. Section 386.270, RSMo2000 states:

All rates, tolls, charges, schedules and joint rates fixed by the commission shall be in force and shall be prima facie lawful, and all regulations, practices and services prescribed by the commission shall be in force and shall be prima facie lawful and reasonable until found otherwise in a suit brought for that purpose pursuant to the provisions of this chapter.

Thus, once AT&T Missouri's tariff went into effect, that tariff acquired:

the force and effect of law; and as such it is binding upon both the corporation filing it and the public which it serves. ... If such a schedule it to be accorded the force and effect of law, it is binding, not only upon the utility and the public, but upon the Public Service Commission as well.⁹

As a result, AT&T Missouri's payphone rates that were put into effect by its 1997 tariff are the company's lawful rates and remain in effect.

The complainants seek to attack the lawfulness of AT&T Missouri's payphone services tariff by attacking the lawfulness of the Commission's order that approved that tariff. In their response to AT&T Missouri's Motion to Dismiss, the Complainants argue that the Commission's order that approved AT&T Missouri's tariff was unlawful because the Commission did not conduct a hearing under contested case procedures before issuing its order approving the tariff and did not make findings of fact and conclusions of law in its order approving the tariff.

The Complainants' argument that the Commission was required to conduct a hearing and make findings of fact and conclusions of law when it approved AT&T Missouri's tariff is legally incorrect. First, the Commission's decision whether to suspend a filed tariff is a noncontested case for which there is no automatic right to a hearing.¹⁰ Second, in a noncontested case the Commission is not required to make findings of fact.¹¹

More importantly, the Complainant's attempt to collaterally attack the Commission's 1997 order is precluded by Missouri law. Section 386.550, RSMo 2000 states: "In all collateral actions or proceedings the orders and decisions of the commission which have become final shall be conclusive." That means, "if a statutory review of an order is not successful, the order becomes final and cannot be attacked in a collateral proceeding."¹² Consequently, the Commission's 1997 order approving AT&T Missouri's payphone rates cannot be challenged in this proceeding.

⁸ *In the Matter of Southwestern Bell Telephone Company's Revision to the General Exchange Tariff*, PSC Mo. No. 35, *Regarding Deregulated Pay Telephone Service*, 6 Mo. P.S.C. 3d 216 (1997).

⁹ *State ex rel. St. Louis County Gas Co. v. Pub. Serv. Com'n of Mo.* 315 Mo. 312, 317, 286 S.W. 84, 86 (Mo. 1926).

¹⁰ *State ex rel. Coffman v. Pub. Serv. Com'n*, 121 S.W.3d 534 (Mo. App. W.D. 2003).

¹¹ *State ex rel. Public Counsel v. Pub. Serv. Com'n*, 210 S.W.3d 344 (Mo. App. W.D. 2006).

¹² *State ex rel. Licata, Inc. v. Pub. Serv. Com'n*, 829 S.W.2d 515 (Mo. App. W.D. 1992).

Just because the Commission's 1997 order is not subject to collateral attack does not mean AT&T Missouri's payphone rates can never be challenged. Instead, the Complainants can challenge those rates without engaging in a forbidden collateral attack by alleging a change in circumstances that would render those rates no longer in the public interest.¹³ The Complainants have made such an allegation in their complaint and for the purposes of this motion, the Commission must presume that allegation to be correct. However, at this point, the Complainants' attempt to challenge AT&T Missouri's payphone rates runs headlong into the previously established fact that the Commission no longer has statutory authority to modify the rates charged by a competitive company such as AT&T Missouri. Thus the Commission no longer has authority to determine whether the rates AT&T Missouri charges for payphone service are in the public interest.

The Commission no longer has authority to alter AT&T Missouri's competitive rates, but can it, as the Complainant's ask, order the company to make refunds for past overcharges? Clearly, the Commission has no authority to order such refunds. First, since AT&T Missouri's payphone rates were lawfully established in 1997 and have remained the company's lawful rates since that time, there could be no factual basis for any refund. Second, even if there were some factual basis for ordering a refund, the Commission has no legal authority to do so.

The Missouri Supreme Court has held that retroactive ratemaking is not allowed under Missouri law. In the words of the court, "[the Commission] may not, however, redetermine rates already established and paid without depriving the utility (or the consumer if the rates were originally too low) of his property without due process."¹⁴ Thus, the Commission has no authority under state law to order AT&T Missouri to make any refunds to the Complainants.

That leaves open the question of whether this Commission is required under federal law to order AT&T Missouri to make refunds to the Complainants. The FCC has indicated that there is no "absolute right to refunds" in cases such as this that have been addressed by other state commissions. Instead, the FCC notes that "in deciding whether to award refunds, the state commissions properly looked to applicable state and federal law and regulations and decided for reasons specific to each state's analysis, not to order refunds."¹⁵ The Commission concludes that nothing in federal law requires it to order AT&T Missouri to make refunds to the Complaints.

To summarize, the Commission concludes it has no authority to order a competitive company such as AT&T Missouri to charge a particular rate for its competitive services, including its payphone services. Furthermore, the Commission concludes that the Commission has no legal authority to order AT&T Missouri to make a refund to customers of its payphone services even if the Commission were to find that the company's payphone rates were improperly calculated in 1997. Together, those two conclusions mean the Commission cannot grant the relief the Complainants seek and therefore their complaint must be dismissed.

¹³ *State ex rel. Ozark Border Elec. Co-op v. Pub. Serv. Com'n*, 924 S.W.2d 597, 601 (Mo. App. W.D. 1996).

¹⁴ *State ex rel. Util. Consumers' Council of Missouri, Inc. v. Pub. Serv. Com'n*, 585 S.W.2d 41, 58 (Mo. 1979).

¹⁵ *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, FCC 13-24, Paragraph 41, (Released February 27, 2013).

AT&T Missouri also contends the Complainants have failed to properly perfect their complaint by failing to comply with the requirements of Section 386.390(1), RSMo 2000. This argument about deficiencies in the complaint is not dispositive because, even if the Commission found in AT&T Missouri's favor, the Complainants could cure any such deficiencies by amending their complaint. Since the Commission concludes that the complaint must be dismissed on the previously described grounds, the Commission will not address these additional arguments.

THE COMMISSION ORDERS THAT:

1. The complaint of Tari Christ d/b/a ANJ Communications, et al. against Southwestern Bell Telephone Company, L.P. d/b/a Southwestern Bell Telephone Company is dismissed.
2. This order shall become effective on July 5, 2013.

R. Kenney, Chm., Jarrett, Stoll, and
W. Kenney, CC., concur.

Woodruff, Chief Regulatory Law Judge

In the Matter of Cedar Green Land Acquisition, LLC for a Certificate of Convenience and Necessity Authorizing it to Own, Operate, Maintain, Control and Manage Water Systems in Camden County, Missouri

File No. WA-2013-0117

In the Matter of Cedar Green Land Acquisition, LLC for a Certificate of Convenience and Necessity Authorizing it to Own, Operate, Maintain, Control and Manage Sewer Systems in Camden County, Missouri

File No. SA-2013-0354

WATER

§2. Certificate of convenience and necessity

When the parties to an application for certificates of convenience and necessity to operate a water and sewer company settled their issues, and showed that the application qualified for certificates of convenience and necessity, the Commission granted the application, which resolved a complaint that the applicant had been operating without a certificate of convenience and necessity.

ORDER APPROVING UNANIMOUS STIPULATION AND AGREEMENT AND GRANTING CERTIFICATES OF CONVENIENCE AND NECESSITY

Issue Date: June 19, 2013

Effective Date: July 19, 2013

On September 25, 2012, Cedar Green Land Acquisition, L.L.C. ("Cedar Green") filed an application requesting that the Commission grant it a Certificate of Convenience and Necessity ("CCN") to provide water service to Cedar Green Luxury Condominiums located in Camden County, Missouri. On January 15, 2013, Cedar Green filed an application requesting that the Commission grant it a CCN to provide sewer service to the condominiums.¹ The Commission ordered that notice of the application be given to the public and interested parties. The Commission did not receive any requests to intervene.

On February 26, 2013, the Commission's Staff filed a recommendation advising the Commission to approve the applications, subject to certain conditions. On March 28, 2013, the Office of the Public Counsel ("OPC") filed a response to Staff's recommendation questioning the ownership and control of the water and sewer systems and objecting to the cost of service reflected in Staff's recommendation. On June 4, 2013, Cedar Green, Staff and OPC filed a Unanimous Stipulation and Agreement ("Agreement"), which was subsequently corrected on June 18, 2013. The Agreement is intended to resolve all issues identified by the parties and recommends that the Commission grant Cedar Green's applications for water and sewer CCNs, subject to the conditions stated in the Agreement.

¹ Cedar Green submitted the applications in response to a pending formal complaint that was filed by Staff, WC-2013-0087, in which Staff alleges that Cedar Green is presently operating as a public utility and is subject to the jurisdiction of the Public Service Commission. Except for this case, there are no other matters pending before the Commission that would affect, or be affected by, the granting of a CCN to Cedar Green.

The Commission may grant a water or sewer corporation a certificate of convenience and necessity to operate after determining that the construction and operation are either “necessary or convenient for the public service.”² The Commission articulated the specific criteria to be used when evaluating applications for utility CCNs in the case *In Re Intercon Gas, Inc.*, 30 Mo. P.S.C. (N.S.) 554, 561 (1991). The *Intercon* case combined the standards used in several similar certificate cases, and set forth the following criteria: (1) there must be a need for the service; (2) the applicant must be qualified to provide the proposed service; (3) the applicant must have the financial ability to provide the service; (4) the applicant's proposal must be economically feasible; and (5) the service must promote the public interest.³

Based on the Commission’s independent and impartial review of the verified filings, the Commission determines that Cedar Green has satisfied all necessary criteria for the grant of the applied-for CCNs. Cedar Green’s provision of water and sewer service to the service area described is in the public interest, and the Commission will grant the request for the certificates and approve the Agreement.

THE COMMISSION ORDERS THAT:

1. Cedar Green Land Acquisition, L.L.C. is granted certificates of convenience and necessity to own, operate, maintain, control and manage the water and sewer systems located in Camden County, Missouri, as more particularly described in its applications and in the parties’ Unanimous Stipulation and Agreement.
2. The Unanimous Stipulation and Agreement, as corrected, is approved. The parties are ordered to comply with the Unanimous Stipulation and Agreement, which is incorporated herein in its entirety as if fully set forth. The Unanimous Stipulation and Agreement shall be attached to this order as Appendix A.
3. The certificates of convenience and necessity are granted subject to the conditions set out in the Unanimous Stipulation and Agreement.
4. This order shall become effective on July 19, 2013.

R. Kenney, Chm., Jarrett
and W. Kenney, CC., concur.
Stoll, C., absent.

Bushmann, Regulatory Law Judge

² Section 393.170.3, RSMo 2000.

³ The factors have also been referred to as the “Tartan Factors” or the “Tartan Energy Criteria.” See Report and Order, *In re Application of Tartan Energy Company, L.C., d/b/a Southern Missouri Gas Company, for a Certificate of Convenience and Necessity*, Case No. GA-94-127, 3 Mo. P.S.C. 3d 173 (September 16, 1994), 1994 WL 762882, *3 (Mo. P.S.C.).

NOTE: The Stipulation and Agreement in this case has not been published. If needed, this document is available in the official case files of the Public Service Commission.

In the Matter of the Application of Southern Union Company, d/b/a Missouri Gas Energy, for a Certificate of Public Convenience and Necessity Authorizing it to Construct, Install, Own, Operate, Control, Manage and Maintain a Natural Gas Distribution System to Provide Gas Service in Newton County, Missouri, as an Expansion of its Existing Certified Area

File No. GA-2013-0483

GAS

§3. Certificate of convenience and necessity

Having found that serving a new customer is necessary and convenient for the public service, the Commission granted a gas company's application for an expanded certificate of convenience and necessity, and ordered the filing of revised tariffs.

**ORDER GRANTING CERTIFICATE OF CONVENIENCE AND NECESSITY
AND DIRECTING COMPANY TO FILE TARIFF**

Issue Date: June 19, 2013

Effective Date: June 29, 2013

Background

On April 30, 2013, Southern Union Company, d/b/a Missouri Gas Energy filed an application with the Missouri Public Service Commission requesting authority to construct and operate a gas system and provide gas service to customers in Newton County as an expansion of its existing certificated area. On April 30, the Commission issued notice of the application setting May 30 as the deadline for requests to intervene. There were no such requests. On June 7, the Staff of the Commission filed a recommendation to approve the application and grant the company a certificate of convenience and necessity.

Staff Recommendation

Staff recommends that the Commission approve the application and grant the requested certificate to MGE. In support of its recommendation, Staff states the following:

1. That MGE is willing and able to provide the requested service under existing tariff provisions;
2. Extending gas service would not jeopardize natural gas service to the company's existing customers;
3. No interveners have objected to the certificate request;
4. MGE anticipates using customary state highway, railroad, and county rights of way;
5. The requested service area is expected to develop a new customer; and
6. No new franchises are required.

Staff also recommends that MGE file, within 30 days of the Commission's order, revised tariff sheets reflecting this certificate.

In its Memorandum, Staff further explains that MOARK, LLC, a farming operation, has requested service from MGE. The proposed area of service is adjacent to MGE's service area. Other than the use of customary highway, railroad, and county rights of way, the project will not require any new franchises. In order to provide service, MGE will need to extend its distribution main 3,520 feet into the requested sections and install 730 feet of service line from the distribution main to the prospective customer. The total cost of the project will be \$59,217.

Discussion

The Commission may grant a certificate of convenience and necessity to a gas corporation upon determining that such grant of authority is “necessary or convenient for the public service.”¹ The Commission has relied on the following criteria in making this determination:

1. There must be a need for the service;
2. The applicant must be qualified to provide the proposed service;
3. The applicant must have the financial ability to provide the service;
4. The applicant’s proposal must be economically feasible; and
5. The service must promote the public interest.²

Based on the verified application and the verified Staff Recommendation and Memorandum, the Commission finds that granting MGE a Certificate of Convenience and Necessity meets the above-listed criteria and is therefore necessary and convenient for the public service.

The law requires the Commission to make this determination “after due hearing.”³ There was no request for an evidentiary hearing. The requirement for a hearing is met when the opportunity for hearing is provided and no party requests the opportunity to present evidence.⁴ The Commission therefore need not hold an evidentiary hearing.

Having found that granting this certificate is necessary and convenient for the public service, the Commission will grant the request relief. As recommended by Staff, the Commission will also direct MGE to file, within 30 days of the effective date of this order, revised tariff sheets consistent with this grant of authority.

THE COMMISSION ORDERS THAT:

1. Southern Union Company, d/b/a Missouri Gas Energy, is granted a Certificate of Convenience and Necessity to construct, install, own, operate, control, manage and maintain a natural gas distribution system to provide gas service in Newton County Missouri, as an expansion of its existing service area.
2. Southern Union Company, d/b/a Missouri Gas Energy, shall file in this case file, within 30 days of the effective date of this order, revised tariff sheets reflecting the grant of authority in this order.
3. This order shall become effective on June 29, 2013.

R. Kenney, Chm., Jarrett and
W. Kenney, CC., concur.
Stoll, C., absent.

Jones, Senior Regulatory Law Judge

¹ Section 393.170, RSMo 2000.

² *In re Tartan Energy Company*, 2 Mo. P.S.C. 173, 177 (1994).

³ Section 393.170.3, RSMo 2000.

⁴ *State ex rel. Deffenderfer Enterprises, Inc. v. Public Service Comm’n of the State of Missouri*, 776 S.W.2d 494 (Mo. App. W.D. 1989).

In the Matter of the Assessment Against the Public Utilities in the State of Missouri for the Expenses of the Commission for the Fiscal Year Commencing July 1, 2013

File No. AO-2013-0525

PUBLIC UTILITIES

§7. Jurisdiction and powers of the State Commission

As directed by statute, the Commission calculated the assessment for all public utilities; and directed the Commission's Budget and Fiscal Services Department to calculate the amount due from each utility, directed the Commission's Director of Administration and Regulatory Policy to deliver a statement of such amount due to each utility, ordered each public utility to pay such amount to the Commission's Budget and Fiscal Services Department, and directed the Commission's Budget and Fiscal Services Department to remit such payment to the Director of Revenue.

ASSESSMENT ORDER FOR FISCAL YEAR 2014

Issue Date: June 19, 2013

Effective Date: July 1, 2013

Pursuant to 386.370, RSMo 2000, the Commission estimates the expenses to be incurred by it during the fiscal year commencing July 1, 2013. These expenses are reasonably attributable to the regulation of public utilities as provided in Chapters 386, 392 and 393, RSMo and amount to \$20,338,787. Within that total, the Commission estimates the expenses directly attributable to the regulation of the six groups of public utilities: electrical, gas, heating, water, sewer and telephone, which total for all groups \$12,111,852. In addition to the separately identified costs for each utility group, the Commission estimates the amount of expenses that could not be attributed directly to any utility group of \$8,226,935.

The Commission estimates that the amount of Federal Gas Safety reimbursement will be \$525,000. The unexpended balance in the Public Service Commission Fund in the hands of the State Treasurer on July 1, 2013, is estimated to be \$1,712,223. The Commission deducts these amounts and estimates its Fiscal Year 2014 Assessment to be \$18,101,564. The unexpended sum is allocated as a deduction from the estimated expenses of each utilities group listed above, in proportion to the group's gross intrastate operating revenue as a percentage of all groups' gross intrastate operating revenue for the calendar year of 2012, as provided by law. The reimbursement from the federal gas safety program is deducted from the estimated expenses attributed to the gas utility group.

The Commission allocates to each utility group its directly attributable estimated expenses. Additional common, administrative and other costs not directly attributable to any particular utility group are assessed according to the group's proportion of the total gross intrastate operating revenue of all utilities groups. Those amounts are set out with more specificity in documents located on the Commission's web page at <http://www.psc.mo.gov>.

ASSESSMENT AGAINST THE PUBLIC UTILITIES

23 Mo. P.S.C. 3d

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The Commission fixes the amount so allocated to each such group of public utilities, net of said estimated unexpended fund balance and federal reimbursement as follows:

Electric	\$ 9,630,629
Gas	\$ 4,104,411
Steam/Heating	\$ 68,466
Water	\$ 1,618,959
Sewer	\$ 707,914
Telephone.....	\$ 1,971,185
Total	\$18,101,564

The Commission will collect an assessment for the Office of Public Counsel which is included in the total assessment amount of \$18,101,564.

The Commission allocates a proportionate share of the \$18,101,564 to each industry group as indicated above. The amount allocated to each industry group is allotted to the companies within that group. This allotment is accomplished according to the percentage of each individual company's gross intrastate operating revenues compared to the total gross intrastate operating revenues for that group. The amount allotted to a company is the amount assessed to that company.

The Budget and Fiscal Services Department of the Commission is hereby directed to calculate the amount of such assessment against each public utility, and the Commission's Director of Administration and Regulatory Policy shall render a statement of such assessment to each public utility on or before July 1, 2013. The assessment shall be due and payable on or before July 15, 2013, or at the option of each public utility, it may be paid in equal quarterly installments on or before July 15, 2013, October 15, 2013, January 15, 2014, and April 15, 2014. The Budget and Fiscal Services Department shall deliver checks to the Director of Revenue the day they are received.

All checks shall be made payable to the Director of Revenue, State of Missouri; however, these checks must be sent to:

Missouri Public Service Commission
Budget and Fiscal Services Department
P.O. Box 360
Jefferson City, MO, 65102-0360

THE COMMISSION ORDERS THAT:

1. The assessment for fiscal year 2014 shall be as set forth herein.
2. The Budget and Fiscal Services Department of the Commission shall calculate the amount of such assessment against each public utility.
3. On behalf of the Commission, the Commission's Director of Administration and Regulatory Policy shall render a statement of such assessment to each public utility on or before July 1, 2013.
4. Each public utility shall pay its assessment as set forth herein.
5. The Budget and Fiscal Services Department shall deliver checks to the Director of Revenue the day they are received.

ASSESSMENT AGAINST THE PUBLIC UTILITIES

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6. This order shall become effective on July 1, 2013.
7. This case shall be closed on July 2, 2013.

R. Kenney, Chm., Jarrett
and W. Kenney, CC., concur.
Stoll, C., absent.

Woodruff, Chief Regulatory Law Judge

In the Matter of Cedar Green Land Acquisition, LLC for a Certificate of Convenience and Necessity Authorizing it to Own, Operate, Maintain, Control and Manage Water Systems in Camden County, Missouri

File No. WA-2013-0117

In the Matter of Cedar Green Land Acquisition, LLC for a Certificate of Convenience and Necessity Authorizing it to Own, Operate, Maintain, Control and Manage Sewer Systems in Camden County, Missouri

File No. SA-2013-0354

EVIDENCE, PRACTICE AND PROCEDURE

§24. Procedures, evidence and proof

§27. Finality and conclusiveness

The Commission granted the parties' motion to withdraw amended proposed schedules of depreciation, and modified its earlier order to strike those amended schedules and substitute the schedules originally proposed.

ORDER AMENDING ORDER APPROVING UNANIMOUS STIPULATION AND AGREEMENT AND GRANTING CERTIFICATES OF CONVENIENCE AND NECESSITY

Issue Date: June 26, 2013

Effective Date: June 26, 2013

On June 19, 2013, the Missouri Public Service Commission ("Commission") issued an *Order Approving Unanimous Stipulation and Agreement and Granting Certificates of Convenience and Necessity* ("Order"), which approved the Unanimous Stipulation and Agreement ("Agreement") between the parties and granted Cedar Green Land Acquisition, L.L.C. a Certificate of Convenience and Necessity to provide water and sewer service to Cedar Green Luxury Condominiums located in Camden County, Missouri. The Agreement approved by the Order incorporated revised schedules of depreciation rates that the Commission's Staff requested be substituted in its *Notice of Correction to Unanimous Stipulation and Agreement and Schedule of Depreciation Rates*, filed on June 18, 2013 ("Notice of Correction").

On June 21, 2013, the Staff, the Office of Public Counsel, and Cedar Green Land Acquisition, L.L.C. (collectively, the "Parties"), filed a *Motion to Withdraw Filing and to Amend Order* ("Motion"). The Parties state in the Motion that the Notice of Correction was filed by Staff in error due to a miscommunication. The Parties now believe that the revised schedules of depreciation rates in the Notice of Correction should not have been filed. The Parties request that the Commission approve the withdrawal of the Notice of Correction and amend the Order to include the original schedules of depreciation rates filed with the Agreement on June 4, 2013.

The Commission has the legal authority to modify or vacate its orders.¹ The Commission finds the Motion filed by the Parties to be reasonable and will grant the Motion and amend its order issued on June 19, 2013 accordingly.

THE COMMISSION ORDERS THAT:

1. The Parties' *Motion to Withdraw Filing and to Amend Order* is granted.
2. The Commission's *Order Approving Unanimous Stipulation and Agreement and Granting Certificates of Convenience and Necessity*, issued on June 19, 2013, is amended by deleting Schedules 1 and 2, Schedules of Depreciation Rates, in the Unanimous Stipulation and Agreement, and replacing those schedules with the original schedules of depreciation rates filed with the Agreement on June 4, 2013.
3. This order shall become effective immediately upon issuance.

R. Kenney, Chm., Jarrett,
Stoll, and W. Kenney, CC.,
concur.

Bushmann, Regulatory Law Judge

¹ Section 386.490.2, RSMo Supp. 2012, "Every order or decision of the commission shall of its own force take effect and become operative thirty days after the service thereof, except as otherwise provided, and shall continue in force either for a period which may be designated therein or until changed or abrogated by the commission, unless such order be unauthorized by this law or any other law or be in violation of a provision of the constitution of the state or of the United States." (emphasis added)

NOTE: The Stipulation and Agreement in this case has not been published. If needed, this document is available in the official case files of the Public Service Commission.

In the Matter of Kansas City Power & Light Company's Practices Regarding Customer Opt-Out of Demand-Side Management Programs and Related Issues**File No. EO-2013-0359****EVIDENCE, PRACTICE AND PROCEDURE****§24. Procedures, evidence and proof****§30. Settlement procedures**

When parties sought relief without citing law authorizing such relief or facts relevant under such law, the Commission issued its consent order embodying the parties' terms without ruling on the merits of any pleading.

CONSENT ORDER AND DISMISSAL

Issue Date: June 26, 2013

Effective Date: July 2, 2013

The Missouri Public Service Commission is:

- Approving the disposition of this action by settlement because disposition by settlement is in the public interest;
- Incorporating the *Non-Unanimous Stipulation and Agreement's* terms into this order; and
- Dismissing the action because the parties have resolved all disputes.

The disputes involved provisions for customer opt out of demand-side programs under the Missouri Energy Efficiency Investment Act ("MEEIA")¹ and related law. This order does not determine the merits of any claim or defense, including without limitation whether any violation of statute or Commission tariff, regulation, or order ("violation") occurred, and whether any tariff not yet filed supports safe and adequate service at just and reasonable rates.

Background

On January 18, 2013, Kansas City Power & Light Company ("KCPL") and the Commission's staff ("Staff") initiated this action by filing the *Joint Application to Establish a Proceeding to Review [KCPL's] Practices Regarding Customer Opt-Out of Demand-Side Management Programs and Associated Programs' Costs and Revenue Impacts* ("application").² The application asked the Commission to open a contested case. The Commission granted applications to intervene from:

- Missouri Department of Natural Resources.³
- Midwest Energy Users' Association.⁴
- Midwest Energy Consumer's Group ("MECG");⁵

and granted an application to intervene out of time from Midwest Industrial Energy Consumers ("MIEC").⁶

¹ Section 393.1075, RSMo Supp. 2012.

² Electronic Filing and Information System ("EFIS") No. 1.

³ EFIS No. 18, *Order Granting Intervention*, March 15, 2013.

⁴ EFIS No. 18, *Order Granting Intervention*, March 15, 2013.

⁵ EFIS No. 18, *Order Granting Intervention*, March 15, 2013.

⁶ EFIS No. 20, *Order Granting Late Intervention*, March 20, 2013.

In response to a Commission order to state the relief sought, cite the authority for granting it, and allege facts under which that authority applies, KCPL and Staff filed further pleadings.⁷ Among the relief sought in those responses was an order authorizing deferred recording for certain accounting entries (“AAO”)⁸ and a finding that KCPL had violated a statute or Commission tariff, regulation, or order (“complaint”). The Commission then issued a notice of contested case.⁹

KCPL, Staff, MECG, and MIEC (“signatories”) filed the settlement.¹⁰ No party objected to the settlement within seven days, so the Commission will treat the settlement as unanimous, as the Commission’s regulation provides.¹¹ The settlement includes a waiver of procedural formalities¹² including a hearing.¹³ Because no party seeks an evidentiary hearing, no hearing is required.¹⁴ The Commission must state its conclusions of law¹⁵ but need not separately state any findings of fact when a stipulation, agreed settlement, or a consent order disposes of a case.¹⁶

On those grounds, the Commission independently finds, concludes, and orders the following.

Findings, Conclusions, and Order

Because KCPL is an electrical company,¹⁷ the Commission has jurisdiction generally over KCPL’s operations.¹⁸ The Commission has specific authority to determine a complaint and to issue a consent order. The Commission does not have authority to issue an advisory opinion.²¹

⁷ EFIS Nos. 27 and 28.

⁸ AAO is an acronym for “accounting authority order.”

⁹ EFIS No. 20, *Notice of Contested Case and Procedural Schedule*.

¹⁰ EFIS No. 36, *Non-Unanimous Stipulation and Agreement*.

¹¹ 4 CSR 240-2.115(2)(C).

¹² Section 536.060(3), RSMo 2000.

¹³ Sections 536.060, RSMo 2000.

¹⁴ *State ex rel. Rex Deffenderfer Ent., Inc. v. Public Serv. Comm’n*, 776 S.W.2d 494, 496 (Mo. App., W.D. 1989).

¹⁵ Section 386.420.2, RSMo 2000.

¹⁶ Section 536.090, RSMo 2000.

¹⁷ [KCPL]’s *Initial Pleading and Notice of Relief Requested*, EFIS No. 28, page 2-3, paragraph 5-6.

¹⁸ Section 393.140(1), RSMo 2000.

¹⁹ Section 386.390.1, RSMo 2000.

²⁰ Section 536.060, RSMo 2000.

²¹ *State ex rel. Laclede Gas Co. v. Public Serv. Comm’n of State of Mo.*, 392 S.W.3d 24, 38 (Mo. App., W.D. 2012).

The settlement sets forth the agreement of the signatories, including:

- MECG will dismiss its action in Case No. WD76164 at the Court of Appeals.²²
- KCPL's filing of tariff sheets,²³ specimens of which are attached.²⁴
- The Commission's issuance of an AAO.²⁵

The signatories also seek the Commission's approval of the settlement.²⁶

A. Terms

But the Commission's approval of the settlement cannot mean a decision on the merits for several reasons.

- Actions before the Court of Appeals are outside the Commission's subject matter jurisdiction,²⁷ so the Commission cannot order dismissal of such an action.
- No tariff sheet as described in the settlement has yet been filed, so a decision on its merits would constitute an advisory opinion.²⁸
- Issuance of an AAO is unsupported by evidence or stipulated facts relevant to the law that provides when such relief should issue.²⁹

As to the complaint, a conclusion that no violation exists would support no relief under the complaint, and the settlement includes no stipulation to a violation. Therefore the Commission concludes that the signatories have not shown that the Commission can and should approve their terms.

Nevertheless, a Commission's determination on the settlement is apt because the Commission is not merely a tribunal. The Commission discussed a similar situation in an earlier decision.³⁰ Though not binding on the Commission, the analysis in that decision is persuasive.

²² EFIS No. 36, *Non-Unanimous Stipulation and Agreement*, page 4-5, paragraph 5.D.

²³ EFIS No. 36, *Non-Unanimous Stipulation and Agreement*, page 2, paragraph 5.A.

²⁴ EFIS No. 36, *Non-Unanimous Stipulation and Agreement*, Attachment A.

²⁵ EFIS No. 36, *Non-Unanimous Stipulation and Agreement*, page 5, paragraph 5.G.

²⁶ EFIS No. 36, *Non-Unanimous Stipulation and Agreement*, page 8.

²⁷ Missouri Constitution, Art. II, Section 1.

²⁸ *Akin v. Director of Revenue*, 934 S.W.2d 295, 298 (Mo. banc 1996).

²⁹ 18 CFR Part 101, which includes the *Uniform System of Accounts Prescribed for Public Utilities and Licensees subject to the provisions of the Federal Power Act*, incorporated to Missouri law at 4 CSR 240- 20.030(1).

³⁰ *Superior Bowen Asphalt Company, LLC, Complainant vs. Southern Union Company d/b/a Missouri Gas Energy, Respondent*, File No. GC-2011-0101, EFIS No. 54, *Consent Order and Dismissal with Prejudice* issued May 9, 2012.

B. Disposition

The disposition of any complaint is subject to the Commission's determination of the public interest.³¹ That is because the elements of a complaint always include a violation of statute or Commission tariff, regulation, or order:

Complaint may be made by the commission of its own motion, or by [other entities] in writing, setting forth any [conduct of] any . . . public utility . . . claimed to be in violation, of any provision of law, or of any rule or order or decision of the commission [. ³²]

Generally, every statute, Commission tariff, regulation, or order implicates the public interest if it relates to "efficient facilities and substantial justice between patrons and public utilities."³³ Partly for that reason, OPC is a party to this action³⁴ so that an advocate for the public interest³⁵ always remains whatever private parties like a utility and its industrial customers—and even Staff—may agree to.

The public interest is plainly more urgent in, for example, alleged pervasive safety violations than an isolated billing dispute with a sophisticated business entity. But this action relates to efficient facilities, and substantial justice between patrons and public utilities, because the application relates to MEEIA and other provisions of law. Those provisions state that:

- Demand-side management ("DSM") program participation and payment are optional for certain customers,³⁶
- KCPL shall not charge the customer for any DSM program under MEEIA or by any other authority upon notice from a customer to KCPL,³⁷ and
- the notice is effective for the following calendar year and each successive calendar year.³⁸

And, unlike a private party or State agency, Staff has no authority of its own to settle an action, so Commission approval of Staff's participation in the settlement in this action is necessary.

³¹ The Commission's regulation on summary determination expressly provides that the Commission will not grant a motion for summary determination unless summary determination procedure is in the public interest. A ruling that summary determination procedure is in the public interest is implicit when the Commission grants a motion for summary determination. 4 CSR 240-2.117(1); *Public Serv. Comm'n of State of Missouri v. Missouri Gas Energy*, 388 S.W.3d 221, 228 (Mo. App., W.D. 2012). Here, the Commission is making no determination other than whether the procedure is in the public interest, so an implicit ruling is impossible, and an express ruling is necessary.

³² Section 386.390.1, RSMo 2000.

³³ *Public Serv. Comm'n of State v. Missouri Gas Energy*, 388 S.W.3d 221, 228 (Mo. App., W.D. 2012).

³⁴ 4 CSR 240-2.010(10).

³⁵ Section 386.710.1(3), RSMo 2000.

³⁶ Sections 393.1075.7, RSMo Supp. 2012.

³⁷ Sections 393.1075.7, .8, .9, and .10, RSMo Supp. 2012, and 4 CSR 240-20.094(6)(F).

³⁸ 4 CSR 240-20.094(6)(F).

C. Ruling

The Commission concludes that disposition by settlement is in the public interest so the Commission will approve that disposition.³⁹ The Commission will also issue this consent order that, by analogy to a consent judgment, memorializes the signatories' terms without determining their merits.⁴⁰ There being no further relief for the Commission to grant, the Commission will also dismiss this action and cancel the hearing.

THE COMMISSION ORDERS THAT:

1. Disposition by settlement is approved.
2. The terms of the *Non-Unanimous Stipulation and Agreement* are memorialized, by incorporating them by reference into this order, as if fully set forth
3. This action is dismissed as of the effective date of this order.
4. This order shall be effective on July 2, 2013.
5. This file shall close on July 4, 2013.

R. Kenney, Chm., Jarrett, Stoll, and
W. Kenney, CC., concur.

Jordan, Senior Regulatory Law Judge

³⁹ Undisputed resolution of this action constitutes good cause for an effective date less than 30 days from issuance. Section 386.490.2, RSMo 2000.

⁴⁰ *Nations v. Hoff*, 78 S.W.3d 222, 223 (Mo. App., E.D. 2002).

NOTE: The Stipulation and Agreement in this case has not been published. If needed, this document is available in the official case files of the Public Service Commission.

In the Matter of the Joint Application of Southern Union Company d/b/a Missouri Gas Energy, The Laclede Group, Inc., and Laclede Gas Company for an Order Authorizing the Sale, Transfer, and Assignment of Certain Assets and Liabilities from Southern Union Company to Laclede Gas Company and, in Connection Therewith, Certain other Related Transactions

File No. GM-2013-0254

CERTIFICATES

§43. Gas

§53. Consolidation or merger

GAS

§3. Certificate of convenience and necessity

The Commission approved the purchase of one gas company by another, granted a certificate of convenience and necessity to the buyer to serve the former service area of the seller, and approved financing in the amount of \$1.02 billion to pay for the acquisition.

ORDER APPROVING UNANIMOUS STIPULATION AND AGREEMENT

Issue Date: July 17, 2013

Effective Date: July 31, 2013

On July 2, 2013, Southern Union Company d/b/a Missouri Gas Energy, the Laclede Group, Laclede Gas Company, the Staff of the Commission, the Office of the Public Counsel, City of Kansas City, IBEW Local Union No. 53, Midwest Gas Users' Association, and Missouri Department of Natural Resources filed a stipulation and agreement to resolve all issues connected with the proposed sale of the Missouri Gas Energy natural gas system to Laclede. Two parties - United Steelworkers District 11, AFL-CIO and Kansas City Power & Light Company / KCP&L Greater Missouri Operations Company - did not initially join in the stipulation and agreement. Subsequently, on July 9, United Steelworkers District 11 filed a notice indicating it was joining in the stipulation and agreement. Kansas City Power & Light / KCP&L Greater Missouri Operations Company did not oppose the stipulation and agreement within seven days of its filing and therefore, pursuant to Commission Rule 4 CSR 240.2.115(2), the Commission will treat the stipulation and agreement as unanimous.

The Commission conducted an on-the-record proceeding regarding the stipulation and agreement on July 10, 2013. At that proceeding, the Commission questioned the parties about the terms of the stipulation and agreement and gathered additional information about the Transaction and the conditions set forth in the stipulation and agreement.

The stipulation and agreement sets forth numerous conditions on the sale of the Missouri Gas Energy assets to Laclede Gas Company. Among those agreed upon conditions are a rate moratorium whereby Laclede Gas Company agrees not to file a general rate case for its Laclede Gas service territory prior to October 1, 2015, unless there is a significant unusual event that has a major impact on any of its Missouri service territories. Laclede Gas Company will be allowed to file a general rate case for its Missouri Gas Energy service territory no later than September 18, 2013. The stipulation and agreement also provides that any acquisition premium paid for Missouri Gas Energy in connection with the Transaction shall not be recovered in retail distribution rates. The stipulation and agreement contains additional conditions designed to protect customers from any adverse credit and capital cost impacts resulting from the Transaction; conditions designed to protect the quality of service provided to customers; and numerous other

conditions that set out how the Transaction will occur and that will protect customers and the public from any adverse impact from the Transaction.

The stipulation and agreement also asks the Commission to approve Laclede Gas Company's plan to finance its purchase of the Missouri Gas Energy system from Southern Union Company. In accordance with Section 393.200 RSMo, the Commission finds that the money, property or labor to be procured or paid for by Laclede Gas Company through the issuance and sale of debt and equity is reasonably required and necessary for the purposes described in the stipulation and agreement and will be used therefore and that such purposes are not in whole or in part reasonably chargeable to operating expenses or to income.

After reviewing the stipulation and agreement, the Commission independently finds and concludes that such stipulation and agreement is in the public interest and should be approved.

THE COMMISSION ORDERS THAT:

1. The Stipulation and Agreement filed on July 2, 2013, is approved as a resolution of the issues addressed in that stipulation and agreement. The signatory parties are ordered to comply with the terms of the stipulation and agreement. A copy of the stipulation and agreement is attached to this order, and is incorporated herein by reference.

2. Southern Union Company d/b/a Missouri Gas Energy and Laclede Gas Company are authorized to perform in accordance with the terms of the Purchase and Sale Agreement.

3. The sale, transfer, and assignment of certain assets of Southern Union Company to Laclede Gas Company, as more fully described in the Purchase and Sale Agreement, is authorized, with a closing date effective as of September 1, 2013, subject to the provisions of the Purchase and Sale Agreement and Southern Union Company's unilateral right to waive the condition of simultaneous closing of the transaction with Laclede Gas Company and the sale of its New England Gas Company assets to Plaza Massachusetts Corp.

4. Laclede Gas Company is granted a certificate of convenience and necessity to provide natural gas service as a gas corporation and public utility, subject to the jurisdiction of the Commission in the service areas presently served by Missouri Gas Energy as a division of Southern Union Company. In connection therewith, the requirements of Commission rule 4 CSR 240.3.205 are waived.

5. Laclede Gas Company is authorized to provide natural gas service in the areas served by Missouri Gas Energy, as a division of Southern Union Company, in accordance with the rules, regulations, rates and tariffs of Missouri Gas Energy as may be on file with and approved by the Commission on the effective date of the closing of the transaction, including the tariff sheets reflecting the existing base rates, ISRS rates, and purchase gas adjustment of Missouri Gas Energy. Laclede Gas Company is authorized to adopt said tariff sheets, and to operate under them as they may be changed from time to time as provided by law.

6. Laclede Gas Company is authorized to adopt Southern Union Company's authorized depreciation rates for the involved assets.

7. Laclede Gas Company is authorized to raise up to and including \$1.02 billion, at any time beginning July 31, 2013 and ending one year after the closing of the Transaction, by issuing common or preferred stock, receiving paid-in capital, and issuing long-term indebtedness, including debt evidenced by First Mortgage Bonds, by using the Laclede Gas Company assets and the Missouri Gas Energy assets acquired from Southern Union Company as security as may be necessary in connection with the financing of the transaction contemplated by the Purchase and Sale Agreement and the Joint Application or as may be necessary in accordance with the terms and conditions of any of Laclede Gas Company's financing instruments and to execute, enter into, deliver and perform in accordance with all necessary agreements, notes, and other documents as are necessary to issue the debt.

8. Southern Union Company is authorized to transfer to Laclede Gas Company, and Laclede Gas Company is authorized to acquire and record on its books and records the current levels of certain assets and liabilities of Southern Union Company related to the Missouri Gas Energy assets.

9. Laclede Gas Company is authorized to account for Missouri Gas Energy's pension benefit costs on a basis consistent with Missouri Gas Energy's currently approved methodology as established in Missouri Gas Energy File No. GR-2009-0355 stipulation and agreement to use FAS 87 calculations for regulatory purposes that do not reflect the impact of purchase accounting and that the prepaid pension asset receives similar treatment as the prepaid asset under Missouri Gas Energy's approved methodology.

10. Laclede Gas Company is authorized to account for the MGE gas employees and retirees post-retirement welfare benefit cost on a basis consistent with the methodology used by Southern Union Company immediately prior to the sale. The Commission finds that the FAS 106 calculations do not reflect the impact of purchase accounting.

11. Southern Union Company, effective upon the closing of the transaction, is authorized to terminate its responsibilities as a gas corporation in Missouri subject to the jurisdiction of the Commission.

12. Southern Union Company and Laclede Gas Company are authorized to enter into, execute and perform in accordance with the terms of all other documents which may be reasonably necessary and incidental to the performance of the Transaction which is the subject of the Purchase and Sale Agreement and the Joint Application,

13. The parties are granted such other relief as may be deemed necessary to accomplish the purposes of the Purchase and Sale Agreement and the Joint Application, as amended, and to consummate the sale, transfer and assignment of the assets and related transactions pursuant to the Purchase and Sale Agreement.

14. Laclede Gas Company shall submit to the Commission within sixty (60) days of closing the transaction a listing and description of all items that Laclede Gas Company exercised under the authority in paragraph 13 above.

SOUTHERN UNION COMPANY d/b/a MISSOURI GAS ENERGY, THE LACLEDE
GROUP, INC. and LACLEDE GAS COMPANY

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15. All prefiled testimony is admitted into the record.
16. This order shall become effective on July 31, 2013.

R. Kenney, Chm., Jarrett, Stoll, and
W. Kenney, CC., concur.

Woodruff, Chief Regulatory Law Judge

NOTE: The Stipulation and Agreement in this case has not been published. If needed, this document is available in the official case files of the Public Service Commission.

**In the Matter of the Second Prudence Review of Costs Subject to the
Commission-Approved Fuel Adjustment Clause of Union Electric Company,
d/b/a Ameren Missouri**

File No. EO-2012-0074

REPORT AND ORDER

RATES

§101. Fuel clauses

§104. Electric and power

Fuel adjustment clause ("FAC") required electric company to divide revenues between customers and itself 95/5 respectively. That split did not apply to off-system sales of electricity under long-term requirement contracts. Long-term requirement contracts did not describe contract sales of electricity for terms of 15 months and 18 months that the electric company had described in various documents as intermediate term sales. Therefore, those sales were subject to the FAC and the electric company acted imprudently in treating them outside the FAC.

Issue Date: July 31, 2013

Effective Date: August 30, 2013

APPEARANCES

Thomas M. Byrne, Managing Assoc. General Counsel, Ameren Services Company, Post Office Box 66149, 1901 Chouteau Ave., St. Louis, Missouri 63103; and
James B. Lowery, Attorney at Law, Smith Lewis, LLP, 111 South Ninth Street, Suite 200, Columbia, Missouri 65201
For Union Electric Company, d/b/a Ameren Missouri.

Brent Roam, Attorney at Law, Bryan Cave, LLP, 211 N. Broadway, Suite 3600, St. Louis, Missouri 63102.
For Missouri Industrial Energy Consumers.

Lisa C. Langeneckert, Attorney at Law, Sandberg, Phoenix & Von Gontard, P.C., 515 North 6th Street, St. Louis, Missouri 63101.
For Barnes-Jewish Hospital.

Lewis R. Mills, Jr., Public Counsel, Post Office Box 2230, 200 Madison Street, Suite 650, Jefferson City, Missouri 65102
For the Office of the Public Counsel and the Public.

Kevin A. Thompson and Amy Moore, Chief Staff Counsel and Legal Counsel, Post Office Box 360, 200 Madison Street, Jefferson City, Missouri 65102
For the Staff of the Missouri Public Service Commission.

SENIOR REGULATORY LAW JUDGE: Ronald D. Pridgin

The Missouri Public Service Commission, having considered all the competent and substantial evidence upon the whole record, makes the following findings of fact and conclusions of law. The Commission in making this decision has considered the positions and arguments of all of the parties. Failure to specifically address a piece of evidence, position, or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision.

Summary

This order determines that Union Electric Company d/b/a Ameren Missouri acted imprudently, improperly and unlawfully when it excluded revenues derived from power sales agreements with AEP and Wabash from off-system sales revenue ("OSSR") when calculating the rates charged under its fuel adjustment clause.

Procedural History

On October 28, 2011, the Commission's Staff filed a Prudence Report and Recommendation regarding its second prudence review of Ameren Missouri's costs related to its fuel adjustment clause (FAC). In its Report, Staff concluded that Ameren Missouri acted imprudently in not including certain costs and revenues in calculating the FAC rate it billed to its customers.

The costs and revenues Staff contends were improperly excluded from the fuel adjustment clause are associated with Ameren Missouri's sales of energy to American Electric Power Operating Companies (AEP) and to Wabash Valley Power Association, Inc. (Wabash). Staff advised the Commission to order Ameren Missouri to refund approximately \$26.3 million plus interest to its customers by an adjustment to its FAC charge.

Ameren Missouri disputed Staff's claim of imprudence and on November 7, 2011, and again on March 7, 2012, requested a hearing regarding Staff's recommendation. Commission Rule 4 CSR 240-3.161(10) provides that parties to the rate case in which the Commission established Ameren Missouri's fuel adjustment clause are automatically parties to this prudence audit case, without the necessity of having to apply for intervention. By that rule, the following entities are parties to this case:

AARP;
Consumers Council of Missouri;
IBEW Local Union 1455, 1439, 2, 309, 649, and 702;
International Union of Operating Engineers – Local No. 148;
Laclede Gas Company;
Missouri Coalition for the Environment;
Missouri Department of Natural Resources;
Missouri Energy Group;
Missouri Industrial Energy Consumers;
Missourians for Safe Energy;
Noranda Aluminum; State of Missouri; and
The Commercial Group.

On March 30, 2012, following a prehearing conference, the Commission established a procedural schedule leading to an evidentiary hearing regarding Staff's recommended adjustment to Ameren Missouri's FAC charge. In compliance with the established procedural schedule, the interested parties prefiled direct, rebuttal, and surrebuttal testimony.

The evidentiary hearing was held on June 21, 2012. The parties filed post-hearing briefs on July 20, 2012, with reply briefs following on August 24, 2012. Because a pending case at The Missouri Court of Appeals, which will be discussed later, would dictate how the Commission should proceed, the Commission awaited the court's opinion before proceeding further.

List of Issues

On June 12, 2012, the parties submitted a Joint List of Issues. The issues are as follows:

1. Are the revenues derived from the power sales agreements between Ameren Missouri and counter-parties Wabash Valley Power Association, Inc. ("Wabash") and American Electric Power Service Corporation as agent for the AEP Operating Companies ("AEP") excluded from the definition of "OSSR" found in the Original Tariff Sheets Nos. 98.2 and 98.3 of Ameren Missouri's Fuel and Purchase Power Adjustment Clause, which took effect March 1, 2009?
2. Was it imprudent, improper and/or unlawful for Ameren Missouri to exclude the Company's power sale agreements with AEP and Wabash from off-system sales and not include the revenues collected under the Company's power sale agreements with AEP and Wabash in OSSR and, therefore, not include those revenues in its calculation of the Fuel and Purchased Power Adjustment rates for the time period of October 1, 2009, to June 20, 2010?
3. Did Ameren Missouri's conduct described in Paragraph 2, above, result in harm to its ratepayers?
4. Should Ameren Missouri refund to its ratepayers through its FAC the amount improperly collected from them by virtue of the conduct described in Paragraph 2, above?
5. What is the amount that should be refunded, if any?

Findings of Fact

1. On January 27, 2009, the Commission issued a Report and Order¹ in Commission File Number ER-2008-0318 concerning Ameren Missouri's request for a general rate increase. As part of that Report and Order, the Commission approved for the first time Ameren Missouri's request to implement a fuel adjustment clause.

¹ *In the Matter of Union Electric Company, d/b/a AmerenUE's Tariffs to Increase Its Annual Revenues for Electric Service*, Report and Order, File No. ER-2008-0318 (January 27, 2009).

2. The next day, January 28, 2009, Southeastern Missouri was struck by a terrible ice storm.² The ice storm knocked down the power lines that serve the aluminum smelter operated by Noranda Aluminum, Inc. As a result, the smelter lost electric power in mid-cycle, causing the molten aluminum to solidify in the smelting equipment. Noranda quickly restored one of the three production lines, but could not immediately put the second and third lines back into production. Two-thirds of Noranda's production capacity was lost while the solidified aluminum was jackhammered out of the equipment.³

3. When Noranda lost production capacity, it reduced the amount of electricity it purchased from Ameren Missouri. The loss of sales to Noranda was a serious problem for Ameren Missouri because Noranda normally buys a lot of electricity. Before the damage resulting from the ice storm, Noranda hourly consumed more than 460 megawatts of electricity at a very high load factor, meaning it used nearly the same amount of electric power every hour of every day throughout the year.⁴

4. Because of the damage to Noranda's production capacity, Ameren Missouri stood to lose approximately \$90 million per year of its normal electric sales to Noranda.⁵

5. Since Ameren Missouri would not be selling as much electric power to Noranda, it would have more electric power available to sell on the off-system market.⁶

6. Such off-system sales could partially offset the revenue lost on sales of power to Noranda. However, there was a problem with off-system sales. Under the fuel adjustment clause that the Commission approved the day before the ice storm, revenue from off-system sales is used to offset Ameren Missouri's fuel purchase costs, subject to a 95/5 sharing mechanism.⁷ That means Ameren Missouri is allowed to pass 95 percent of any net changes in fuel/purchased power costs through to its customers outside of a general rate case. The other 5 percent must be absorbed by the company's shareholders.⁸

7. Normally, the fuel adjustment clause would benefit Ameren Missouri because the company would be allowed to pass through to customers 95 percent of what were anticipated to be rising fuel costs without having to experience the delay that would result if the company had to file a new rate case to recover those increased fuel costs. However, that 95/5 sharing mechanism also applied to off-system sales. That means 95 percent of any increase in off-system sales would benefit ratepayers rather than the company by offsetting rising fuel costs under the fuel adjustment clause's formula.⁹

² Barnes Direct, Ex. 1, Page 8, Lines 8-15.

³ *Id.*, lines 18-22.

⁴ Haro Direct, Ex. 3, Page 6, Line 10 through Page 7, Line 2.

⁵ Barnes Direct, Ex. 1, Page 9, Lines 1-4.

⁶ *Supra* at fn. 4, Page 7, Line 4 through Page 8, Line 5.

⁷ Eaves Direct/Rebuttal, Ex. 8, Page 8, Lines 1-16.

⁸ *Id.*

⁹ *Id.* at Page 12, Lines 16-24.

8. Thus, if Ameren Missouri simply replaced the revenue it could no longer earn by selling power to Noranda - revenue that is not subject to sharing mechanism of the fuel adjustment clause - by selling more power off-system, it would be unable to retain 95 percent of that replacement revenue. That would result in a revenue shortfall for Ameren Missouri's shareholders.¹⁰

9. Ameren Missouri first attempted to avoid that revenue shortfall by asking the Commission to rehear its Report and Order and modify the approved fuel adjustment clause to exclude revenue from those off-system sales used to offset the lost sales to Noranda.¹¹ The Commission denied Ameren Missouri's application for rehearing in an order issued on February 19, 2009.¹²

10. In its February 19 order denying Ameren Missouri's application for rehearing, the Commission found that it could not modify the fuel adjustment clause tariff in the manner Ameren Missouri requested without setting aside the approved stipulation and agreement regarding the fuel adjustment clause, reopening the record to take evidence on the appropriateness of the proposed change, and making a decision before the March 1, 2009 operation of law date. The Commission concluded that such action was "obviously impossible" and on that basis denied Ameren Missouri's application for rehearing. The Commission's order did not make any decision or ruling on the merits of Ameren Missouri's proposal, nor did the Commission take any evidence on the merits of that proposal.¹³

11. After the Commission denied Ameren Missouri's application for rehearing, the company's revised tariff, now including the fuel adjustment clause, went into effect on March 1, 2009.¹⁴

12. With the fuel adjustment clause now in effect, Ameren Missouri began looking for a means to sell power to replace the lost Noranda load. In replacing that load, Ameren Missouri sought to enter into sales contracts that would most closely resemble the service to Noranda by rebalancing the load with regard to the type of customer served and credit exposure faced by Ameren Missouri.¹⁵

13. Ameren Missouri subsequently entered into two contracts that it describes as long-term partial requirements contracts. The first contract was with American Electric Power Service Corporation (AEP) for 100 megawatts for a duration of 15 months. The second contract was with Wabash Valley Power Association, Inc., to serve Citizen Electric load in Missouri. That contract was for 150 megawatts for a duration of 18 months.¹⁶

¹⁰ Barnes Direct, Ex. 1, Page 10, Lines 12-17.

¹¹ *In the Matter of Union Electric Company d/b/a AmerenUE's Tariffs To Increase its Annual Revenues for Electric Service*, File No. ER-2008-0318, Application for Rehearing and Motion for Expedited Treatment (February 5, 2009).

¹² *In the Matter of Union Electric Company d/b/a AmerenUE's Tariffs To Increase its Annual Revenues for Electric Service*, File No. ER-2008-0318, Order Denying AmerenUE's Application for Rehearing (February 19, 2009).

¹³ *Id.*

¹⁴ *Supra* at fn. 10.

¹⁵ Haro Direct, Ex. 3, Page 4, Line 1 through Page 8.

¹⁶ *Id.* at page 7, lines 6-12.

14. Ameren Missouri's description of these contracts as long-term partial requirements contracts is important because of the controlling terms found in the fuel adjustment clause tariff. That tariff provides:

Off-System Sales shall include all sales transactions (including MISO revenues in FERC Account Number 447), excluding Missouri retail sales and long-term full and partial requirements sales, that are associated with (1) AmerenUE Missouri jurisdictional generating units, (2) power purchases made to serve Missouri retail load, and (3) any related transmission.¹⁷ (emphasis added).

Ameren Missouri contends these contracts fall within the tariff's exclusion for long-term full and partial requirements sales, the other parties contend they do not. The question then becomes: what are the appropriate definitions of "long term" and "full and partial requirements" sales?

15. Before examining those definitions in more detail, it is important to understand the genesis of Ameren Missouri's fuel adjustment clause tariff. The definition of off-system sales that is at issue in this case was initially proposed through the testimony of Ameren Missouri's witness, Marty Lyons, as part of Ameren Missouri's request for a fuel adjustment clause in Ameren Missouri's rate case, ER-2008-0318.¹⁸

16. The parties in ER-2008-0318 did not agree that Ameren Missouri should be allowed to implement a fuel adjustment clause and the Commission resolved that overall issue in its report and order. However, the parties were able to agree upon the details of the language that would be included in the fuel adjustment clause tariff if the Commission decided to allow Ameren Missouri to implement a fuel adjustment clause. The exact language of the tariff, including the definition of off-system sales, was agreed to in a stipulation and agreement that the Commission approved as part of the resolution of ER-2008-0318.¹⁹

17. The only testimony about the intent of the parties when they agreed upon the definition of off-system sales was offered by Lena Mantle on behalf of Staff.²⁰ As case coordinator and expert witness for Staff, Mantle was involved in negotiations surrounding the development of Ameren Missouri's fuel adjustment tariff.²¹ She testified that, based on conversations with Ameren Missouri's representatives, she understood that the tariff definition was designed to exclude from operation of the fuel adjustment clause the wholesale electric supply contracts that Ameren Missouri had entered into with various municipal utilities.²²

¹⁷ Eaves Direct/Rebuttal, Ex. 8, Schedule DEE-5-3.

¹⁸ Transcript, Pages 11-12.

¹⁹ Barnes Direct, Ex. 1, Page 5, Line 13 through Page 6, Line 1.

²⁰ At all pertinent times, Mantle was the Manager of the Energy Department, Utility Operations Division of the Missouri Public Service Commission.

²¹ Mantle Direct/ Rebuttal, Ex. 9, Page 5, Lines 14-21.

²² *Id.* at page 6, lines 1-26.

18. The exclusion of those municipal contracts from the operation of the fuel adjustment clause makes sense, because in the pending rate case, ER-2008-0318, Ameren Missouri's costs were allocated to municipal utilities through energy and demand allocators. In other words, Ameren Missouri's costs to provide wholesale service to the municipalities were not being flowed through the Fuel Adjustment Clause, so it would have been inappropriate to flow the revenues received from the municipalities through the Fuel Adjustment Clause. Including those revenues within the fuel adjustment clause would have required Ameren Missouri to pay all the costs of those contracts while receiving credit for only five percent of the revenues generated through those contracts.²³

19. When Ameren Missouri's fuel adjustment tariff was once again before the Commission in Ameren Missouri's next rate case, ER-2010-0036, the parties, including Ameren Missouri, stipulated that the tariff's definition of off-system sales would be changed to specifically exclude long-term full and partial requirements sales to Missouri municipalities.²⁴ As a result, under the revised tariff, revenue from both the Wabash and the AEP contracts would be treated as off-system sales and would be flowed through the fuel adjustment clause.

20. With that background, we can now return to a discussion of the definitions of "long-term" and "full and partial requirements" sales. Ameren Missouri's fuel adjustment clause tariff does not define either term, so the parties proposed their own definitions. Ameren Missouri would base its definitions on the way in which such contracts are currently treated in the wholesale electric marketplace.²⁵ The other parties would define those terms in what they describe as a more traditional regulatory context.²⁶

21. In the context of today's marketplace for wholesale electric power, a long-term power supply contract is one that covers a period of one year or more.²⁷

22. While a contract with a duration of one year or more is treated as a long-term contract within the context of the wholesale electric market, this Commission is not seeking to define the term in that context. Rather, the Commission must define long-term within a regulatory context. In that context, a long-term contract is one that lasts five years or longer, an intermediate term contract is longer than one year, but less than five years, and a short-term contract is one year or less.²⁸

23. In its 2009 annual report, Ameren Missouri does not classify either the Wabash or the AEP contracts as long-term requirements contracts.²⁹

²³ *Id.* at page 7, lines 4-4

²⁴ Barnes Direct, Ex. 1, page 12, Lines 7-10.

²⁵ Haro Surrebuttal, Ex. 4, Page 1, Line 17 through Page 4, Line 23.

²⁶ Mantle Direct/Rebuttal, Ex. 9, Page 6, Line 1 through Page 10, Line 6. Brubaker Rebuttal, Ex. 10, Page 5, Lines 1 through Page 6, Line 23.

²⁷ *Supra* at fn. 25.

²⁸ Eaves Direct/Rebuttal, Ex. 8, Page 15, Line 8 through Page 16, Line 24.

²⁹ *Id.* at page 16, lines 31-34.

24. Ameren Missouri filed its 2009 annual report before the Commission's decision in Ameren Missouri's first prudence review case of its fuel adjustment clause.³⁰

25. Ameren Missouri filed a 2010 annual report in which it referred to the AEP contract at issue as Requirements Service and Short-Term Firm Service, and in which it referred to the Wabash contract at issue as Short-Term Firm Service.³¹

26. Ameren Missouri refers to the definition of "Partial Requirements" offered by the Edison Electric Institute as support for its definition of a partial requirements contract. That definition is as follows:

A wholesale customer who purchases, or is committed to purchase, only a portion of its electric power generation need from a particular entity. There is often a specified contractual ceiling on the amount of power that a partial requirements customer can take from the entity. In contrast, a "requirements" or "full requirements" customer is committed to purchase all of its needs from a single entity and generally would not have a ceiling on the amount of power it can take.³²

27. Edison Electric Institute also offers a definition of "Full Requirements" as follows:

A wholesale customer (utility) that is committed to purchase all of its electric power generation from a single generator and generally there is not a ceiling on the amount of power purchased.³³

28. Neither the definition of "Partial Requirements," nor the definition of "Full Requirements," actually defines "Requirements." Instead, they simply define the difference between partial and full requirements. If the meaning of "Requirements" is to be understood in either definition, reference must be made back to the definition offered for Requirements Service.

29. The Edison Electric Institute defines "Requirement Service" as: Service that the supplier plans to provide on an ongoing basis (i.e. the supplier includes projected load for this service in its system planning). In addition, the reliability of requirements service must be the same as, or second only to, the supplier's service to its own ultimate customers."³⁴ The same definition of requirement service is found in the instructions for completion of the FERC Form 1.³⁵

³⁰ *Id.* at page 17, lines 3-12.

³¹ *Id.* at page 16, lines 25-28.

³² Haro Surrebuttal, Ex. 4, Schedule JH-S5.

³³ *Id.*

³⁴ Brubaker Rebuttal, Ex. 10, Schedule MEB-3.

³⁵ *Supra* at fn. 34, Schedule JH-S3.

30. Consistent with those definitions, the commonly understood concept of requirements service is the provision of power to municipal customers or rural electric cooperatives on a basis whereby the selling utility incorporates the requirements of these customers into its resource planning.³⁶

31. The key phrase in the definition of requirements service is that it is service the supplier plans to provide on an ongoing basis. The Wabash and AEP contracts are for terms of only 18 and 15 months and Ameren Missouri acknowledged that it entered into those contracts to replace the Noranda load lost due to the ice storm.³⁷ Those contracts expired on May 31, 2010, and October 31, 2010, and were not renewed.³⁸ In short, it is clear that Ameren Missouri did not intend to provide these services to Wabash and AEP on an ongoing basis.

32. All parties agree that Ameren Missouri's existing electric sales contracts with various municipalities are requirements sales that are properly excluded from the tariff's definition of off-system sales. The Wabash and AEP contracts differ substantially from Ameren Missouri's contracts with the municipalities in that Ameren Missouri provides substantially more capacity and energy services to the municipalities than it did to Wabash and AEP under their contracts. The contracts with AEP and Wabash strictly provide capacity and energy, leaving the buyer to arrange the transmission, pay for transmission and for all other services required to accept the power from the seller. In addition, the municipal contracts were longer in length than the AEP and Wabash contracts.³⁹

33. In short, the contracts with the municipalities are for requirements service and Ameren Missouri designated them as such in its 2009 FERC Form 1 filing. In contrast, Ameren Missouri categorized the Wabash and AEP as Intermediate Firm Service, and not as Requirements Service in that same 2009 FERC Form 1 filing.⁴⁰

34. In Ameren Missouri's subsequent rate case, File No. ER-2010-0036, the parties signed a *Second Nonunanimous Stipulation and Agreement*. The agreement had the specific limited purpose of resolving the treatment of the AEP and Wabash contracts only for that case.⁴¹

³⁶ *Supra* at fn. 36, page 5, lines 1-8.

³⁷ Haro Direct, Ex. 3, Page 7, Lines 4 through Page 8, Line 3.

³⁸ Transcript, Page 101, Lines 20-25.

³⁹ Brubaker Rebuttal, Ex. 10, Page 7, Line 4 through Page 8, Line 10.

⁴⁰ *Id.* at Page 5, Lines 1-24.

⁴¹ Mantle Direct/Rebuttal, Ex. 9, Page 9, Line 21 through Page 10, Line 6.

35. That stipulation contains a mathematical formula which uses a “W-Factor”. That “W-Factor” was simply a part of the settlement of how the AEP and Wabash contract revenues should be treated in File No. ER-2010-0036.⁴² Ameren Missouri offered evidence that some \$3.3 million of margins arising from the AEP and Wabash contracts have already been flowed back to customers because the language of the *Second Nonunanimous Stipulation and Agreement* contained a stand-alone provision called “AEP and Wabash Contracts” that credited customers for 12 months after the new rates set in that rate case took effect.⁴³ The Commission found Ms. Mantle more credible than Mr. Weiss on this issue.

36. If the parties to the stipulation meant for the “W-Factor” to offset the AEP and Wabash margins that had not flowed through the fuel adjustment clause, then the parties could have, and likely would have, stated so in the stipulation. Instead, the stipulation included language that specifically allowed the parties to take any position in a subsequent case regarding the AEP and Wabash contracts.⁴⁴

37. If the revenues Ameren Missouri received from the Wabash and AEP contracts during the recovery periods at issue in this case are flowed through the Fuel Adjustment Clause, Ameren Missouri must refund its customers \$26,342,791, plus interest accrued at Ameren Missouri’s short-term borrowing rate from May 31, 2011 until the amount is refunded.⁴⁵

Conclusions of Law

1. Ameren Missouri is a public utility, and an electrical corporation as those terms are defined in Section 386.020(43) and (15), RSMo Supp. 2010. As such, Ameren Missouri is subject to the Commission’s jurisdiction pursuant to Chapters 386 and 393, RSMo.

2. Section 386.266.4(4), RSMo Supp. 2010, gives the Commission authority to approve an electrical corporation’s fuel adjustment tariff if it finds that the tariff includes “provisions for prudence reviews of the costs subject to the adjustment mechanism no less frequently than at eighteen-month intervals, and shall require refund of any imprudently incurred costs plus interest at the utility’s short-term borrowing rates.” The fuel adjustment tariff that the Commission approved for Ameren Missouri contains such provisions.

3. Commission Rule 4 CSR 240-20.090(7) establishes procedures for the conduct of prudence reviews respecting fuel adjustment tariffs.

4. In order to disallow a utility’s recovery of costs from its ratepayers, a regulatory agency must find both that the utility acted imprudently and that such imprudence resulted in harm to the utility’s ratepayers.⁴⁶

⁴² *Id.* at Page 10, Lines 8-16.

⁴³ Weiss Direct, Ex. 5, Page 3, Line 20 through Page 4, Line 20; Weiss Surrebuttal, Ex. 6, Page 7, Line 13 through Page 8, Line 13.

⁴⁴ *Supra* at fn. 46, Page 12, Lines 6-10.

⁴⁵ Eaves Direct/Rebuttal, Ex. 8, Page 1, Line 25 through Page 2, Line 3.

⁴⁶ *State ex rel. Assoc. Natural Gas Co. v. Public Serv. Comm’n*, 954 S.W.2d 520 (Mo. App. W.D. 1997).

5. The Commission established its standard for determining the prudence of a utility's expenditures in a 1985 decision. In that decision, the Commission held that a utility's expenditures are presumed to be prudently incurred, but, if some other participant in the proceeding creates a serious doubt as to the prudence of the expenditure, then the utility has the burden of dispelling those doubts and proving the questioned expenditure to have been prudent.⁴⁷

6. Section 386.266.4(1), RSMo Supp. 2010, gives the Commission authority to approve an electrical corporation's fuel adjustment tariff if it finds that the tariff is "reasonably designed to provide the utility with a sufficient opportunity to earn a fair return on equity." The Commission has approved such a tariff for Ameren Missouri and no one challenges that tariff in this case. Ameren Missouri argues that this provision also requires the Commission to interpret the language of the previously approved tariff in a manner that protects the utility's ability to earn a fair return on equity. There is no such requirement in the plain language of the statute and the Commission will interpret this tariff in the same manner it would interpret any other tariff.

7. Under Missouri law, once the Commission approved the fuel adjustment tariff, that tariff acquired "the same force and effect as a statute directly prescribed from the legislature."⁴⁸ Therefore, a reviewing court is to interpret a tariff in the same manner it interprets a statute.⁴⁹

8. For an earlier accumulation period, the Missouri Court of Appeals held that Ameren Missouri imprudently, improperly and unlawfully excluded revenues derived from the AEP Operation Companies, Inc., and Wabash Valley Power Association contracts at issue in this case from off-system sales revenue when calculating the rates charged under its fuel adjustment clause.⁵⁰

9. A fuel adjustment clause allows a utility, outside of a general rate case, to change the charge for power per kilowatt-hour by the amount of an increase or decrease in the utility's fuel costs. The Commission has no power to allow a fuel adjustment clause for the purpose Ameren Missouri is seeking, which is to recover lost retail revenue to cover fixed costs, even in response to a calamitous loss of such revenue.⁵¹ The interpretation Ameren Missouri urges would permit the fuel adjustment clause to be used for an unlawful purpose, which would be to recover lost retail revenues that have no relationship to the variable cost of fuel or purchased power.⁵²

⁴⁷ *In the matter of the determination of in-service criteria for the Union Electric Company's Callaway Nuclear Plant and Callaway rate base and related issues. And In the matter of Union Electric Company of St. Louis, Missouri, for authority to file tariffs increasing rates for electric service provided to customers in the Missouri service area of the company.* 27 Mo. P.S.C. (N.S.) 183 (1985).

⁴⁸ *State ex rel. Laclede Gas Company v. Pub. Serv. Comm'n*, 156 S.W.3d 513, 521 (Mo. App. W.D. 2005), quoting *All-States Transworld Vanlines, Inc. v. Southwestern Bell Tel. Co.*, 937 S.W. 2d 314, 317 (Mo. App. E.D. 1996).

⁴⁹ *Id.*

⁵⁰ *See State ex. rel. Union Electric Company d/b/a Ameren Missouri v. Public Service Commission of the State of Missouri*, Case No. WD 75403 (Opinion issued May 14, 2003; mandate issued June 5, 2013).

⁵¹ *See id.*, slip op. at 26, 38.

⁵² *See id.*, slip op. at 27.

10. The phrase “long-term full and partial requirements sales” in Ameren Missouri’s fuel adjustment clause referred to the four existing municipal contracts in existence when the 2008 general rate case was opened. Such a meaning is consistent with the limited statutorily authorized purpose for fuel adjustment clauses. That meaning also will not render the clause unenforceable due to exceeding the Commission’s statutory authority.⁵³

Decision

1. Are the revenues derived from the power sales agreements between Ameren Missouri and counter-parties Wabash Valley Power Association, Inc. ("Wabash") and American Electric Power Service Corporation as agent for the AEP Operating Companies ("AEP") excluded from the definition of “OSSR” found in the Original Tariff Sheets Nos. 98.2 and 98.3 of Ameren Missouri’s Fuel and Purchase Power Adjustment Clause, which took effect March 1, 2009?

No.

2. Was it imprudent, improper and/or unlawful for Ameren Missouri to exclude the Company’s power sale agreements with AEP and Wabash from off-system sales and not include the revenues collected under the Company’s power sale agreements with AEP and Wabash in OSSR and, therefore, not include those revenues in its calculation of the Fuel and Purchased Power Adjustment rates for the time period of October 1, 2009, to June 20, 2010?

Yes.

3. Did Ameren Missouri’s conduct described in Paragraph 2, above (Decision Section), result in harm to its ratepayers?

Yes.

4. Should Ameren Missouri refund to its ratepayers through its FAC the amount improperly collected from them by virtue of the conduct described in Paragraph 2, above?

Yes.

5. What is the amount that should be refunded, if any?

Ameren Missouri must refund its customers \$26,342,791, plus interest accrued at Ameren Missouri’s short-term borrowing rate from May 31, 2011 until the amount is refunded.

⁵³ See *id.* slip op. at 36.

THE COMMISSION ORDERS THAT:

1. Union Electric Company, d/b/a Ameren Missouri shall refund \$26,342,791 plus interest accrued at Ameren Missouri's short-term borrowing rate from May 31, 2011 until the amount is refunded to its ratepayers by an adjustment to its FAC charge to correct an over collection of revenues for the period of October 1, 2009, to June 20, 2010.
2. All other requests for relief are denied.
3. This report and order shall become effective on August 30, 2013.

R. Kenney, Chm., concurs, with separate concurring opinion to follow;
Stoll and W. Kenney, CC., concur;
Jarrett, C., dissents, with separate dissenting opinion to follow;
and certify compliance with the provisions of Section 536.080, RSMo.

Dated at Jefferson City, Missouri,
on this 31st day of July, 2013.

NOTE: At the time of publication, no opinion of Commissioner Kenney has been filed.

In the Matter of the Second Prudence Review of)	
Costs Subject to the Commission-Approved Fuel)	Case No. EO-2012-0074
Adjustment Clause of Union Electric Company,)	
d/b/a Ameren Missouri)	

**DISSENTING OPINION OF COMMISSIONER TERRY M.
JARRETT**

I dissent.

My concern is that the majority may have misunderstood the appellate opinion involving the first prudence review of costs subject to Ameren's Fuel Adjustment Clause involving a previous accumulation period.¹ The Court of Appeals affirmed the Commission's decision in that prior case.² During discussions at the July 31, 2013, agenda meeting before voting on the Report and Order in this case, it was apparent to me that the main driver in the decision was that the majority felt bound to reach the same decision because of the Court of Appeals opinion relating to the prior case.³ The majority misconstrues both the standard of review that the court applied and the court's actual holding and, to the extent the majority felt bound to vote for the Report and Order because of the appellate opinion, it erred in deciding this case.

In reviewing the Commission's Report and Order in Case No. EO-2010-0255, the Court of Appeals correctly set out the differing standards of review when a tariff is unambiguous as well as when it is ambiguous:

We review the PSC's interpretation of an **unambiguous** tariff *de novo* in the same manner that we would review a trial court's interpretation of a statute. *De novo* review similarly applies to review the PSC's determination of whether a tariff applies to a given set of facts. **If a tariff is ambiguous, however, such that the intended meaning cannot be definitively resolved by the language of the tariff itself, we will apply traditional rules of "statutory" construction, and review the PSC's resort to evidence of the tariff's intended meaning as a factual determination entitled to deference.** 399 S.W.3d 467, 477-78 (citations omitted) (emphasis added).

¹ Case No. EO-2010-0255 (also referred to herein as "the prior case").

² See *State ex rel. Union Electric Company d/b/a Ameren Missouri v. Public Service Commission of the State of Missouri*, 399 S.W.3d 467 (Mo. App. W.D. 2013).

³ I dissented in the prior case. A copy of my dissent in EO-2010-0255 is attached and incorporated herein by reference.

The court further stated:

If Ameren's tariff is ambiguous, however, we review the PSC's resolution of the ambiguity under the reasonableness prong to determine whether the finding is supported by substantial and competent evidence on the whole record.

With this standard of review in mind, we consider competing interpretations of the phrase “long-term full and partial requirements sales” offered by the parties, **and we review the PSC’s conclusion** that the phrase does not include the AEP and Wabash contracts within its scope. *Id.* at 478 (emphasis added).

The court then found that the tariff at issue was ambiguous:

In this case, however, we agree with the parties and the PSC. **The phrase “long-term full and partial requirements sales” is ambiguous.** The phrase “long-term full and partial requirements sales” does not possess a meaning that is “plain and clear to a person of ordinary intelligence.” *Id.* at 480 (citation omitted) (emphasis added).

The court then reviewed the facts relied on as set out in the Commission’s Report and Order, gave them deference, and held that:

The PSC did not err in concluding that Ameren acted imprudently in excluding the revenues from the AEP and Wabash contracts from the fuel adjustment calculation or in ordering Ameren to refund its ratepayers \$17,169,838. *Id.* at 492.

Where the majority goes wrong, I believe, is that it treats the court’s holding as a matter of **law** when actually it is a matter of **fact**. I concede that based on the findings of fact in the prior case, the court made the correct decision to affirm. But the court’s holding that the PSC did not err in determining that the AEP and Wabash contracts were not “long-term full and partial requirements sales” does not mean that such contracts must be so in perpetuity as a matter of law under all facts and circumstances. The court deferred to the Commission’s factual determination.⁴

The court’s holding in no way binds the Commission, either as to **law** or **fact**, in this case, or any future case. Simply because two different cases before the Commission share factual similarities does not make the findings of fact and conclusions of law of one case binding on another. It is a well-established principle that this Commission’s cases do not serve as precedent, and are not binding on future Commissions. That principle also holds true in applying the appellate court’s holding in the prior case to this case. The court’s holding in the prior case was decided as a matter of **fact** having no precedential value or treatment on any later Commission case where different, although similar, facts exist.

This case is not a clone of the prior case. There was a hearing, as well as the admission of testimony, exhibits and other evidence, all distinguishable from the prior case. The Commission is not a roving tribunal—rather, it is limited to the facts before it. The Commission must consider only the facts in this case, and not be tempted to consider facts which were not in evidence in reaching its conclusion (including facts from the prior case). Here, the Commission is faced with a case, separate and distinct from the prior case, and could ultimately have found different facts in this case than those it found in the prior case. Should this case reach the Court of Appeals, the facts of the prior case are beyond the record for the court’s review. The record the court would have before it would be limited to the facts of *this case*.

This case is distinct and separate from the one previously reviewed by the Court of Appeals. The record in this case is not identical to the prior case. Even a Commission made up of the same, identical commissioners, could – based upon the record in this case have decided the credibility of witnesses and the relevance of certain evidence differently than in the prior case, even though the prior case and this case share similarities. Simply put, ***the record here could have led to different findings of fact and conclusions than the prior case***. The outcome of this case was not preordained by the Commission’s prior case or the holding of the Court of Appeals in the prior case.

Furthermore, even assuming for purposes of argument only that the Commission must follow the court’s opinion and find that Ameren acted imprudently, that does not mean a refund to ratepayers is required. Our decisions must take into account both prongs of the prudence test as well as the public interest, not just the interest of the parties to a case. In its Report and Order in this case, the majority did not address the second prong of the prudence test and did not consider the public interest. This is where I part company with the majority in this decision.

Even if Ameren was “imprudent,” a utility must not suffer the consequences of its imprudence unless it causes ratepayers harm. As the majority states in paragraph 4, page 16 of the Conclusions of Law section in the Report and Order: “In order to disallow a utility’s recovery of costs from its ratepayers, a regulatory agency must find **both** that the utility acted imprudently **and that such imprudence resulted in harm to the utility’s ratepayers.**” (*citing State ex rel. Assoc. Natural Gas Co. v. Public Serv. Comm’n*, 954 S.W.2d 520 (Mo. App. W.D. 1997) (emphasis added)).

In paragraph 3 of the Decision section on page 19 of the Report and Order, the majority answers the question “Did Ameren Missouri’s conduct described in Paragraph 2, above (Decision Section) result in harm to its ratepayers?” with a one-word answer: “Yes.” No analysis, no explanation, no reasoning is set forth by the majority—just a conclusory “yes”. In the thirty-seven paragraphs in the Findings of Fact section in the Report and Order, there is no finding that the ratepayers were harmed in any way by Ameren’s actions. Paragraph 37 in the Findings of Fact section on page 15 of the Report and Order indicates the amount of the revenues if the revenues at issue were flowed through the Fuel Adjustment Clause, but does not indicate how ratepayers were harmed by Ameren’s actions. Moreover, in paragraph 8 of the Findings of Fact on page 7 of the Report and Order, the majority finds that if Ameren would sell the power it was no longer able to supply to Noranda as off-system sales, it “would result in a revenue shortfall for Ameren Missouri’s shareholders.” One person’s shortfall is another person’s windfall. The majority actually finds that Ameren was harmed, not the ratepayers.

⁴ *Id.* at 477-78.

In paragraphs 12 and 13 of the Findings of Fact section on page 8 of the Report and Order, the majority finds that Ameren entered into two contracts to sell power to replace the Noranda load.⁵ Even if Ameren's actions were imprudent, it did not cause harm to ratepayers in that but for the ice storm the dollars collected by Ameren under the two contracts would have been paid for by Noranda, for the very same power, and the charges under the Fuel Adjustment Clause to the ratepayers would have been exactly the same as those charges before the majority ordered the refunds. Ameren's actions in this case, even if imprudent, caused no harm to ratepayers. Giving an undeserved windfall to the ratepayers and allowing an undeserved shortfall to the utility is not in the public interest, because it denies the utility the resources it needs to provide safe and adequate service. The Supreme Court of Missouri has affirmed this essential legal principle:

The enactment of the Public Service Act marked a new era in the history of public utilities. Its purpose is to require the general public not only to pay rates which will keep public utility plants in proper repair for effective public service, but further to insure to the investors a reasonable return upon funds invested. The police power of the state demands as much. **We can never have efficient service, unless there is a reasonable guaranty of fair returns for capital invested.**

* * *

These instrumentalities are a part of the very life blood of the state, its people, and a fair administration of the act is mandatory. **When we say "fair," we mean fair to the public, and fair to the investors.**

State ex rel. Washington University et al. v. Public Service Commission, 308 Mo. 328, 344 – 272 S.W. 971, 973 (Mo. banc 1925) (emphasis added).

Terry M. Jarrett
Commissioner



⁵ The majority does not make a specific finding in this case that Ameren did not flow the fuel costs for the two contracts through the Fuel Adjustment Clause. Since that is not disputed, I take it as fact for the purpose of this dissent.

In the Matter of the First Prudence Review)	
of Costs Subject to the Commission-Approved)	
Fuel Adjustment Clause of Union Electric)	Case No. EO-2010-0255
Company, d/b/a Ameren Missouri)	

DISSENTING OPINION OF COMMISSIONER TERRY M. JARRETT
IN THE REPORT AND ORDER

I dissent from the Commission's Report and Order ("Order") because I believe that it reaches the wrong conclusion, is not based upon the law, and is fundamentally flawed in its legal analysis and evidentiary basis for reaching its conclusion.

Findings of Fact

The findings of fact adopted by the majority are inadequate. Many of them are not findings of fact at all. Rather, they are a mixture of regurgitation of allegations and statements of conclusions of law. Following are the facts that I find dispositive of this case:

1. On January 28, 2009, Southeastern Missouri was struck by a terrible ice storm. (Barnes Direct, Exhibit 3, p. 5, Ins. 19-24).
2. The ice storm knocked down the power lines that serve the aluminum smelter operated by Noranda Aluminum, Inc. As a result, the smelter lost electric power in mid-cycle, causing the molten aluminum to solidify in the smelting equipment. Noranda quickly restored one of the three production lines, but could not immediately put the second and third lines back into production. Two-thirds of Noranda's production capacity was lost while the solidified aluminum was jack hammered out of the equipment. (Barnes Direct, Exhibit 3, p. 6, Ins. 4-10).
3. When Noranda lost production capacity, it reduced the amount of electricity it purchased from Ameren Missouri. The loss of sales to Noranda was a serious problem for Ameren Missouri because Noranda normally buys a lot of electricity. Before the damage resulting from the ice storm, Noranda hourly consumed more than 460 megawatts of electricity at a very high load factor, meaning it used nearly the same amount of electric power every hour of every day throughout the year. (*See Report and Order*, Finding of Fact No. 3, *see also*, Haro Direct, Exhibit 1, pgs. 5-6.)
4. Because of the damage to Noranda's production capacity, Ameren Missouri stood to lose approximately \$90 million per year of its normal electric sales to Noranda. (Barnes Direct, Exhibit 3, p. 6, Ins. 12-15). That amounts to approximately four percent of Ameren Missouri's base-rate revenue requirement from which the company's rates were developed. (Barnes Surrebuttal, Exhibit 4, p. 2, Ins. 19-20).
5. Ameren Missouri began looking for a means to sell power to replace the lost Noranda load. In replacing that load, Ameren Missouri sought to enter into sales contracts that would most closely resemble the service to Noranda by rebalancing the load with regard to the type of customer served and credit exposure faced by Ameren Missouri. (Haro Direct, Exhibit 1, pgs. 4-5, Ins. 8-22, 1-17).

6. Ameren Missouri subsequently entered into two contracts that the contracts themselves described as partial requirements contracts. The first contract was with American Electric Power Service Corporation (“AEP”) for 100 megawatts for a duration of 15 months. The second contract was with Wabash Valley Power Association, Inc. (“Wabash”), to serve Citizen Electric load in Missouri. That contract was for 150 megawatts for a duration of 18 months. (Haro Direct, Exhibit 1, p. 7, Ins. 1-10).

7. At all relevant times during this case, Ameren Missouri was subject to a fuel adjustment clause (FAC). Off-Systems Sales were subject to the FAC, with some exclusions, including long-term full and partial requirements sales. The fuel adjustment clause tariff provides:

Off-System Sales shall include all sales transactions (including MISO revenues in FERC Account Number 447), excluding Missouri retail sales and long-term full and partial requirements sales, that are associated with (1) AmerenUE Missouri jurisdictional generating units, (2) power purchases made to serve Missouri retail load, and (3) any related transmission. (Eaves Direct/Rebuttal, Exhibit 11, pg. 4, Ins. 8-12, Sched. DEE-5).

8. In the context of today’s marketplace for wholesale electric power, a long-term power supply contract is one that covers a period of one year or more. (Haro Direct Exhibit 1, p. 1, Ins. 4-6; Highley Surrebuttal, Exhibit 7, p. 5, Ins. 10-13).

9. Ameren Missouri entered into the Wabash and AEP contracts to replace the Noranda load lost due to the ice storm. (Haro Direct, Exhibit 1, p. 7, Ins. 12-13).

10. Ameren Missouri, Wabash, and AEP intended that the contracts were long-term partial requirements contracts. (Tr. p. 52, Ins. 7-11; Haro Direct, Exhibit 1, p. 3, ln. 19; Barnes Direct, Exhibit 3, p. 3, Ins. 5-6, p. 8, Ins. 5-20).

11. By structuring the AEP and Wabash contracts as long-term partial requirements contracts, Ameren Missouri ratepayers received no detrimental impact. They received the same treatment as if the Noranda load had never been curtailed. If the contracts had not been structured that way, ratepayers would have received a windfall from the ice storm. (Barnes Direct, Exhibit 3, p. 8, Ins. 11-16).

12. Ameren Missouri’s fuel and purchase power expenses were prudent. (Staff’s Prudence Report, Exhibit 8, pp. 7, 10-12, 14, 16).

13. Ameren Missouri’s entering into the Wabash and AEP contracts to replace the Noranda load lost due to the ice storm was prudent. (Staff’s Prudence Report, Exhibit 8, p. 18; Tr. p. 500, Ins. 9-19).

Analysis

This case was a prudence review of costs subject to the Commission-approved fuel adjustment clause of Ameren Missouri. The only question before the Commission was whether Ameren’s fuel and purchase power expenses run through the fuel adjustment clause were prudent. It is undisputed that Ameren Missouri’s fuel and purchase power expenses were prudent. As such, no disallowances were appropriate and the analysis should have ended there.

Instead, the majority went further, and focused upon the interpretation of a Commission approved tariff as it applied to the terms of contracts between Ameren Missouri and AEP and Ameren Missouri and Wabash. This was beyond the scope of review. The question of the application of the contracts to the FAC is a matter of applying the law (the tariff) to the facts (the contract). This application is not one of prudence, it is instead rooted in the regulatory function of ratemaking and specifically – rate treatment for the costs associated with the contracts (either included or excluded from the FAC). Staff’s characterization of this analysis as prudence is a misapplication of the principles of prudence. The allocation of the contracts as off system sales by Ameren is a question of law. There is no dispute that the contracts themselves were prudently entered into.

To find prudence under the majority’s chosen context would require that Ameren know in advance the answer to the question of law regarding the contract’s application to the terms of the FAC by this Commission. This prudence review was not the proper vehicle to challenge the contracts’ application to the FAC.

That said, for purposes of argument only, if one assumes that this was the appropriate case for challenging the classification of the contracts, then Ameren Missouri still prevails based upon the competent and substantial evidence in the record. The evidence in this case demonstrates that in determining whether the contracts at issue fall within or outside of the FAC exception for off-system sales, that the circumstances at the time of the decision to enter into the contracts is controlling as to the prudence of the contracts themselves. Ameren Missouri made its best efforts to place itself in a position that was as close to its position that had existed prior to the massive ice storm and the loss of its single largest power customer.¹ Ameren Missouri’s action in securing contracts with AEP and Wabash maintained the status quo regulatory context which was envisioned when the FAC was ordered by this Commission. Ameren Missouri’s action was the type of sound business judgment decision a utility should make under circumstances such as those presented. No evidence, *none*, shows that the contracts with AEP or Wabash were imprudent. For a utility to lose a 500MW customer unexpectedly overnight, for reasons known only to Mother Nature, calls for prompt and decisive action; action that protects not only ratepayers, but also shareholders.

That is exactly what Ameren Missouri did by securing contracts with AEP and Wabash. Any suggestion that Ameren Missouri’s contracts, as drafted, were intended to achieve a result which was not harmonious with its position in relation to its shareholders and ratepayers before the ice storm is not supported by any evidence in this case. No questions were raised in this case that the resulting Order in Case No. ER-2010-0036 fails to meet the legislatures mandate in Section 386.266.4(1) RSMo Cum. Supp. (2009) with regard to the operation of a FAC. As such, the FAC tariff must be in harmony with the law. The majority cannot retroactively create conflict between these two provisions of law.

¹ *Report and Order*, ER-2011-0028, pg. 8, pg. 12 “In replacing that load, Ameren Missouri sought to enter into sales contracts that would most closely resemble the service to Noranda by rebalancing the load with regard to the type of customer serviced and credit exposure by Ameren Missouri.” *See also*, Haro Direct, Ex. 1, Pages 4-5, Lines 8-22, 1-17.

Just as duly promulgated rules of the Commission have the force and effect of law, so do Orders of the Commission. It is also well established that “[A] tariff that has been approved by the Public Service Commission becomes Missouri law and has the same force and effect as a statute enacted by the legislature.” *Bauer v. Southwestern Bell Telephone Co.*, 958 S.W.2d 568, 570 (Mo. App. E.D. 1997). This concept also comports with *Foremost-McKesson, Inc., v. Davis*, 488 S.W.2d 193, 201 (Mo. Banc 1972) where the Court stated that “[I]t is a well-established principle that administrative rules, which were promulgated to implement the act, *must be read in conjunction and harmony therewith and, so read, the rules do not eliminate any statutory requisite of intent or effect.*” (Emphasis added).

To suggest that a contract entered into by Ameren Missouri could have as its result, the creation of an unlawful construct between the FAC tariff and Section 386.266.4(1) would require a finding that Ameren Missouri acted against its own interests, an allegation that was not proven by any evidence presented. What the majority does here is conclude that Ameren Missouri’s contracts with AEP and Wabash, when tested against the FAC tariff, left Ameren Missouri in a different position after the ice storm than before the ice storm, which is not what was intended by Ameren Missouri when it entered into the contracts with AEP and Wabash. The evidence in the case supports Ameren Missouri on this point.

Because a utility has a duty to serve, it cannot merely engage in a transaction which would sell the power formerly used by its largest customer to anyone else, the agreement to sell had to be one that offered Ameren Missouri the flexibility to resume service to Noranda at a time of Noranda’s choosing and that also fit within the resource plans of the utility. This is the statutory confine of service, within which Ameren was legally required to operate. Ameren Missouri, faced with an unprecedented situation, entered into contracts with AEP and Wabash to sell power that would have otherwise been delivered to Noranda. The contracts were intended to place Ameren Missouri in the same, or as similar a situation as possible, as to that which existed prior to the ice storm, and in fact did just that. The Commission’s focus should have been on those two contracts and their prudence, and ended at that point, in favor of Ameren Missouri. The simple reason is that a prudence review does not rely upon hindsight to reach its determination; rather, the review places itself into the shoes of the person making the decision at the time and asks whether a reasonable person, knowing all of the facts and circumstances known at that time, would make the same decision today.

The majority instead works its way through a tortured analysis involving statutory construction, while grafting onto the analysis aspects of contract interpretation as well. Ameren Missouri’s definition of long term partial requirements sales is dispositive. There was no evidence presented that at the time the two contracts were entered into that anything other than Ameren Missouri’s definition was intended by the parties to the contract. The opponents to Ameren Missouri in this matter, and the majority of the Commission, ultimately are saying that no matter what terms, words, or phrases were selected by Ameren Missouri in the contracts with AEP and Wabash, that because Ameren Missouri’s words would have been self serving, they are therefore irrelevant. They are not. To the contrary, Ameren Missouri had every incentive to choose words that would ensure its contractual bargain was met, that the contracts when applied to the FAC achieved the result it desired (keeping it in a position as close to that which existed before the ice storms), and that the contracts’ application to the FAC tariff and the terms of the Order in ER-2010-0036 conformed to the law.

The majority makes much ado about ambiguity. What type of contracts existed between Ameren Missouri, AEP and Wabash were between those parties. Any ambiguities as to those contracts are to be construed under *contract construction standards*. Ameren's representations as to these contracts are undisputed facts because no other party to those contracts presented any evidence or testimony to the contrary; specifically, AEP or Wabash. Mr. Haro testified for Ameren Missouri:

Well, at the time when I entered a contract, I did not look for particular definitions. *What I did was I contacted counterparties and said I need to enter into a long-term partial requirement deal and that's the kind of the section I entered into.* (Tr. p. 52, lns. 7-11) (Emphasis added).

Mr. Haro testified that he told AEP and Wabash that they were entering into long-term partial requirements contracts, and there is no evidence in the record to the contrary. Any other parties' thoughts, beliefs or interpretations are completely and wholly irrelevant. As such, the AEP and Wabash contracts are long-term partial requirements contracts, as those terms are known by the wholesale electricity marketplace.² Ameren Missouri also understood that the FAC tariff was constructed within the wholesale electricity marketplace, the same as the two contracts. These are the facts that were known to Ameren Missouri at the time the contracts were entered into, and no hindsight considerations (or definitions) can change these facts.

The Commission's Staff in interpreting the application of the contracts to the FAC tariff arrived at a definition for long term partial requirements contracts *after* the contracts were executed. Any evidence in the record suggesting otherwise is unpersuasive, contradictory and unreliable. Because of the timing in which Staff's definition arose, it is implausible that such a definition was even plausible *at the time* (without hindsight) the AEP and Wabash contracts were executed. This same absurdity as to timing of the definition is again repeated in Staff's definitional recommendation with regard to the FAC, again a definition applied in hindsight.

Further, Staff's proposed definition ignores the regulatory compact that has existed in Missouri since this Commission was created. This Commission was created to serve the public interest. That is, since regulated utilities are monopolies, this Commission acts as a substitute for the marketplace.³ It follows that if the marketplace provides a solution, then a regulatory solution is not necessary. Thus, the fact that the marketplace defined long-term as one year or more is dispositive. That Staff would look somewhere else other than the marketplace for a definition of long-term is contrary to the regulatory compact.

² Many definitions were offered by the parties in this case for "requirements sales." Missouri law offers a definition for requirements sales under the Uniform Commercial Code. While the UCC is dispositive as to "goods," and therefore not applicable as law to electricity, it is most certainly persuasive authority in this case. Furthermore, the UCC's applicability to gas sales is instructive since many terms and definitions used in the gas business are used with regard to electricity. Also, the UCC's definition of requirement sales appears to be the primordial basis for other definitions in other contexts; a comparison not drawn by any party to this case.

³ Charles F. Phillips, Jr., *The Regulation of Public Utilities*, 3rd ed., p. 182 (1993).

Missouri Revised Statutes Section 400.2-306 (1) A term which measures the quantity by the output of the seller or the requirements of the buyer means such actual output or requirements as may occur in good faith, except that no quantity unreasonably disproportionate to any stated estimate or in the absence of a stated estimate to any normal or otherwise comparable prior output or requirements may be tendered or demanded. (2) A lawful agreement by either the seller or the buyer for exclusive dealing in the kind of goods concerned imposes unless otherwise agreed an obligation by the seller to use best efforts to supply the goods and by the buyer to use best efforts to promote their sale.

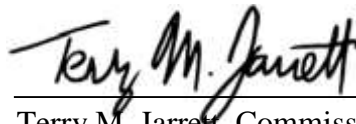
Other references within the UCC for definitional purposes in this case are also persuasive as well, including the UCC treatment of trade usage. Therefore, to dismiss the UCC out of hand in favor of options proposed in this case would be to overlook well established law, which has a long and thorough history in Missouri.

Conclusion

What the majority has done here is to punish Ameren Missouri for a sound business judgment and to give the ratepayers a windfall that they did not deserve. This does not balance the interests of the shareholders with the interests of the ratepayers as the law requires this Commission to do. While this may fit the majority's idea of redistributive social policy, it ignores the facts and violates the law. For that reason, and the other reasons discussed above, I strongly dissent.

Issued this 24th day of May, 2011.

Respectfully submitted,

A handwritten signature in black ink, reading "Terry M. Jarrett", written over a horizontal line.

Terry M. Jarrett, Commissioner

In the Matter of the Application of Transource Missouri, LLC for a Certificate of Convenience and Necessity Authorizing It to Construct, Finance, Own, Operate, and Maintain the Iatan-Nashua and Sibley-Nebraska City Electric Transmission Projects

File No. EA-2013-0098

CERTIFICATES

- §1. Generally
 §6. Jurisdiction and powers of the State Commission
 §21.1. Public interest
 §42. Electric and power

ELECTRIC

- §3. Certificate of convenience and necessity

EVIDENCE, PRACTICE AND PROCEDURE

- §2. Jurisdiction and powers
 §30. Settlement procedures

The Commission approved applications to transfer assets and to build transmission lines with conditions determined by the Commission and by consent order.

REPORT AND ORDER

Issue Date: August 7, 2013

Effective Date: September 6, 2013

The Missouri Public Service Commission is approving disposition by settlement, granting the applications,¹ and incorporating the proposed conditions and terms. The applications relate to two transmission projects: the Iatan-Nashua line and the Sibley-Nebraska City line ("the projects"):

For authorization to	Applicant	Title
Transfer plant and operating rights for the projects	Kansas City Power & Light Company ("KCPL"), and KCP&L Greater Missouri Operations Company ("GMO")	<i>Application of Kansas City Power & Light Company and KCP&L Greater Missouri Operations Company</i> ² ("transfer application")
Construct and operate the projects	Transource Missouri, LLC ("Transource Missouri")	<i>Application of Transource Missouri, LLC for a Certificate of Convenience and Necessity and Request for Waiver</i> ³ ("CCN application")

¹ Consolidated under this file number is the action in File No. EO-2012-0367, *In the Matter of the Application of Kansas City Power & Light Company and KCP&L Greater Missouri Operations Company Regarding Arrangements for Approval to Transfer Certain Transmission Property to Transource Missouri, L.L.C. and for Other Related Determinations*.

² File No. EO-2012-0367, Electronic Filing and Information System ("EFIS") No. 4. All other EFIS citations refer to File No. EA-2013-0098. EFIS is accessible at <http://psc.mo.gov/default.aspx>.

³ EFIS No. 1

I. Jurisdiction

The Commission has jurisdiction over the subject matter because the Commission's jurisdiction generally includes electrical corporations.⁴ That includes KCPL and GMO, because KCPL and GMO own electric plant, and will include Transource Missouri when it owns and operates transmission facilities.⁵ The Commission also has jurisdiction over the disposition of certain utility property,⁶ including operating rights,⁷ and the construction and operation of the utility projects⁸ proposed by Transource Missouri. The signatories cite other statutes supporting the Commission's jurisdiction over the applications as set forth in Appendix 2 of this report and order. Therefore, the Commission concludes that it has jurisdiction to rule on the applications.

II. Docket

KCPL, GMO, and Transource Missouri ("applicants") filed the transfer application and the CCN application ("applications").⁹ The Commission gave notice,¹⁰ and additional notice,¹¹ of the applications and set a deadline for filing applications to intervene. The Commission granted an application to intervene from Missouri Industrial Energy Consumers ("MIEC").¹² The Commission issued notice of a contested case.¹³

Applicants, Staff, and the Office of the Public Counsel ("signatories") filed a stipulation and agreement.¹⁴ The signatories also filed an amendment to the stipulation and agreement.¹⁵ No party filed any objection to the stipulation and agreement or amendment ("together, "settlement") within the time provided by regulation.¹⁶ The Commission convened an evidentiary hearing.¹⁷ The signatories filed a proposed report and order,¹⁸ and a supporting memorandum.¹⁹

⁴ Sections 386.250(1) and 393.140(1), RSMo 2000; and 386.020(43), RSMo Supp. 2012.

⁵ Sections 393.110 and 386.020(15) and (14), RSMo Supp. 2012.

⁶ Sections 393.190.1 and 386.250(1), RSMo 2000.

⁷ Section 386.250(1), RSMo 2000, and 4 CSR 240-3.110(1)(A).

⁸ Section 393.170.1, RSMo 2000.

⁹ On August 31, 2012.

¹⁰ EFIS No. 7, *Order Directing Notice, Setting Intervention Deadline, Directing Filing and Scheduling a Conference*.

¹¹ EFIS No. 9, *Order Directing Additional Notice*; EFIS No. 60, *Order Directing Notice to County Clerks*.

¹² EFIS No. 12, *Order Granting Requests to Intervene*.

¹³ EFIS No. 40, *Notice of Contested Case*.

¹⁴ EFIS No. 54, *Non-Unanimous Stipulation and Agreement*.

¹⁵ EFIS No. 92, *First Amendment to Non-Unanimous Stipulation and Agreement*.

¹⁶ 4 CSR 240-2.115(2)(C).

¹⁷ EFIS No. 61, Transcript volume 2.

¹⁸ EFIS No. 100, *Joint Proposed Order Approving Unanimous Stipulation and Agreement*.

¹⁹ EFIS No. 99, *Joint Memorandum in Support of the Stipulation*.

The Commission convened a settlement conference.²⁰ The signatories filed a

proposed report and order and consent order²¹ with supporting suggestions.²² The Commission ordered the record supplemented²³ with materials that Transource Missouri filed setting forth the final route for the Sibley-Nebraska City line.²⁴

III. Findings, Conclusions, and Orders

The Commission's decision must stand on the law.²⁵ The Commission must always state its conclusions of law.²⁶ The Commission makes each ruling on consideration of each party's allegations and arguments.

A. Procedure

In any Commission proceeding, formalities do not invalidate any order.²⁷ Specifically in a contested case, parties may waive any procedural formality up to the final decision.²⁸

Parties to a contested case may submit a proposed resolution of this action under the Commission's regulations: The parties may at any time file a stipulation and agreement as a proposed resolution of all or any part of a contested case. A stipulation and agreement shall be filed as a pleading.²⁹ A pleading includes the following.

Each pleading shall include a clear and concise statement of the **relief** requested, a specific reference to the statutory provision or other **authority** under which relief is requested, and a concise statement of the **facts** entitling the party to relief. [³⁰]

That regulation also allows the Commission to treat the settlement as unanimous when no party files an objection.³¹ The Commission is doing so, and for that reason the signatories refer to the settlement's components as "Unanimous."³² A stipulation of fact eliminates the need for evidence on the matter stipulated.³³ But that does not end the Commission's duty for the following reasons.

²⁰ EFIS No. 106, *Order Setting Conference*.

²¹ EFIS No. 110, *Second Joint Proposed Order and Joint Proposed Consent Order Approving Unanimous Stipulation and Agreement*.

²² EFIS No. 111, *Joint Suggestions of the Signatories in Support of an Order by the Commission Approving the Unanimous Stipulation and Agreement*.

²³ EFIS No. 109, *First Order Supplementing Record*.

²⁴ EFIS No. 104, *Applicants' Supplemental Filing*.

²⁵ Mo. Const., Art. V, Section 18.

²⁶ Section 386.420.2, RSMo 2000.

²⁷ Section 386.410, RSMo 2000.

²⁸ Sections 536.060(3), RSMo 2000.

²⁹ 4 CSR 240-2.110(1)(A).

³⁰ 4 CSR 240-2.080(4) (emphasis added).

³¹ 4 CSR 240-2.115(2) (emphasis added).

³² Which is why they carry that designation in Appendix 3 and Appendix 4.

³³ *Howard v. Missouri State Bd. of Educ.*, 847 S.W.2d 187, 191 (Mo. App., S.D. 1993).

First, while a stipulation of fact conclusively establishes the matter stipulated,³⁴ no stipulation can control procedure, bind the Commission to a conclusion of law,³⁵ or contravene a statute.³⁶ A remedy statutorily committed to the commission's discretion is therefore not subject to stipulation.³⁷ The Commission must therefore independently make its conclusions of law and determine the relief that is due.

Second, the Commission is charged by statute with protecting the public interest. Also, unlike a private party or State agency, Staff has no authority of its own to settle an action. Therefore, Commission approval is necessary for Staff's participation in the settlement.

Third, the signatories premise their proposed resolution on a Commission determination that the settlement includes no term that is contrary to the public interest. The General Assembly has further specified what the public interest means for certain actions³⁸ in the statutes cited in the signatories' *Joint Suggestions of the Signatories in Support of an Order by the Commission Approving the Unanimous Stipulation and Agreement*,³⁹ as set forth in Appendix 2. The signatories call the determination, that the settlement does not offend those standards, "approval."⁴⁰

Neither the Commission's procedural regulations in 4 CSR 240-2, nor any statute cited in the applications, define "approval" of a stipulation and agreement.⁴¹ As the signatories use that term, they explain, it means reviewing a document to determine whether it is contrary to the public interest. The signatories are correct that the public interest is a consideration in every action before the Commission. Therefore, the Commission rules on the applications accordingly.

B. Merits

The settlement seeks an order granting the applications subject to the provisions of the settlement.

³⁴ *Howard v. Missouri State Bd. of Educ.*, 847 S.W.2d 187, 191 (Mo. App., S.D. 1993).

³⁵ *Bull v. Excel Corp.*, 985 S.W.2d 411, 417 (Mo. App., W.D. 1999).

³⁶ *Tidwell v. Walker Const.*, 151 S.W.3d 127, 133 (Mo. App., S.D. 2004).

³⁷ *Tidwell v. Walker Const.*, 151 S.W.3d 127, 133 (Mo. App., S.D. 2004).

³⁸ The courts have held that such a standard for Commission decisions is an expression of the public interest. *Public Serv. Comm'n of State v. Missouri Gas Energy*, 388 S.W.3d 221, 228 (Mo. App., W.D. 2012).

³⁹ EFIS No. 111.

⁴⁰ This does not tell the Commission what any other set of parties in any other action want when they ask the Commission to "approve" a stipulation and agreement.

⁴¹ The Commission expressly may approve a stipulation related to the Missouri Energy Efficiency Initiative Act under Section 393.1075(11), RSMo Supp. 2012. That statute provides a specific standard for approval. But those provisions do not apply to the applications in this case.

i. Law

The applications are subject to statutory standards that describe the Commission's authority to grant the permissions sought.

For the CCN application, the standard is public convenience and necessity, [⁴²] which means that an additional service would be an improvement that justifies the cost,⁴³ and includes such conditions as the Commission "may deem reasonable and necessary."⁴⁴

For the transfer application, the standard implicit in the applicable statute⁴⁵ is the absence of public detriment.⁴⁶ Like the standard, the authority to condition the transfer is not express. But guarding against public detriment implicitly includes conditions to that end, which is more efficient than denial of an imperfect application.

Among the proposed terms conditions are waivers of specified Commission regulations. For those regulations, the standard for waiver is good cause.⁴⁷ Good cause means a good faith request for reasonable relief.⁴⁸

The signatories also ask that no term or condition that is contrary to the public interest, on its face or as explained in the record, and as gauged by the standards in Appendix 2, find its way into the Commission's order.

ii. Fact

Meeting those standards requires evidence, or a substitute for evidence like stipulated facts, on the record.⁴⁹ Applicants have the burden of proof.⁵⁰ The quantum of proof necessary to carry that burden is the preponderance of the evidence⁵¹ or reasonable inferences from the evidence.⁵² Generally in any proceeding, technical rules of evidence do not bind the Commission.⁵³

This record includes evidence relevant to the standards. All findings needed to support this decision stand on the facts stipulated in the settlement and in the *Second Joint Proposed Order and Joint Proposed Consent Order Approving Unanimous Stipulation and Agreement*, the testimony provided at the evidentiary hearing,⁵⁴ and the prepared testimony of the parties received into the record. That testimony is in the record pursuant to the signatories' waiver of procedural formalities.⁵⁵

⁴² Section 393.170.3, RSMo 2000.

⁴³ *State ex rel. Intercon Gas, Inc., v. Public Serv. Comm'n*, 848 S.W.2d 593, 597 (Mo. App., W.D. 1993).

⁴⁴ Section 393.170.3, RSMo 2000

⁴⁵ Section 393.190.1, RSMo 2000.

⁴⁶ *State ex rel. City of St. Louis v. Public Service Comm'n of Missouri*, 73 S.W.2d 393, 395 (Mo. 1934).

⁴⁷ 4 CSR 240-2.060(4)(B).

⁴⁸ *American Family Ins. Co. v. Hilden*, 936 S.W.2d 207, 210 (Mo. App., W.D. 1996).

⁴⁹ Mo. Const., Art. V, Section 18.

⁵⁰ *Central Cnty. Emergency 911 v. International Ass'n of Firefighters Local 2665*, 967 S.W.2d 696, 699 (Mo. App., W.D. 1998).

⁵¹ *State Board of Nursing v. Berry*, 32 S.W.3d 638, 641 (Mo. App., W.D. 2000).

⁵² *Farnham v. Boone*, 431 S.W.2d 154 (Mo. 1968).

⁵³ Section 386.410, RSMo 2000.

⁵⁴ EFIS No. 61, Transcript volume 2.

⁵⁵ EFIS No. 54, *Non-Unanimous Stipulation and Agreement* page 16.

The Commission has considered the substantial and competent evidence on the whole record. Where the evidence conflicts, the Commission determines which evidence is the most credible, and this report and order reflects the Commission's determinations of credibility implicitly.⁵⁶ No law requires the Commission to make any statement as to what portions of the record the Commission accepted or rejected.⁵⁷ The Commission need not separately state any finding of fact when a stipulation, agreed settlement, or a consent order disposes of the case.⁵⁸ Nevertheless, a brief description of the projects illustrates the factual basis for this report and order.

Transource Missouri is a Delaware limited liability corporation qualified to conduct business in Missouri, with its principal place of business in Columbus, Ohio. Transource Missouri is a wholly-owned subsidiary of Transource Energy, LLC ("Transource"). Transource was established by Great Plains Energy Incorporated ("GPE"), the Companies' parent corporation, and American Electric Power Company, Inc. ("AEP") to build wholesale regional transmission projects within SPP, as well as other regional transmission organizations.

The two projects are regional, high-voltage, wholesale transmission projects approved by Southwest Power Pool, Inc. ("SPP") known as the Iatan-Nashua 345kV transmission project ("Iatan-Nashua Project") and the Sibley-Nebraska City 345kV transmission project ("Sibley-Nebraska City Project") (collectively, the "Projects").

The plant that the Companies requested be transferred to Transource Missouri is property of GMO. KCP&L and GMO previously requested and received authorization from the Commission to transfer at cost from KCP&L to GMO certain transmission property owned and operated by KCP&L between GMO's Alabama Substation and KCP&L's Nashua Substation ("Alabama-Nashua Line"). The southern portion of the Alabama-Nashua Line will be retired and removed, and the corridor will be used to construct the East Segment of the Iatan-Nashua Project. The remaining portion of this existing 161kV line, which runs to GMO's Alabama Substation near St. Joseph, Missouri, will remain the property of GMO and is not to be transferred. This line will continue intact and energized at 161kV as a radial line and will not be a part of the new 345kV facilities.

There is a need for the service to be rendered by the Projects based upon studies performed by SPP in 2009 and 2010. These studies demonstrated that the Projects will improve electric grid reliability, minimize transmission congestion effects, bring economic benefits to SPP members, and help support public policy goals regarding renewable energy. The studies also demonstrated that the Projects will provide estimated benefits and savings that exceed the Projects' estimated costs.

⁵⁶ *Stone v. Missouri Dept. of Health & Senior Servs.*, 350 S.W.3d 14, 26 (Mo. banc 2011).

⁵⁷ *Stith v. Lakin*, 129 S.W.3d 912, 919 (Mo. App., S.D. 2004).

⁵⁸ Section 536.090, RSMo 2000.

Transource Missouri is qualified to construct, finance, own, operate, and maintain the Projects given the support by the transmission and related expertise of KCP&L and of American Electric Power Company, Inc. ("AEP"). Transource Missouri will have the financial ability to construct, own, operate and maintain the Projects given the equity funding that the subsidiaries of Great Plains Energy Incorporated ("GPE"), the parent corporation of KCP&L and GMO, and AEP will provide to Transource Missouri, and Transource Missouri's plan to issue debt. Furthermore, Transource Missouri will fully recover the cost of the Projects once completed, as the Projects' costs are regionally allocated under the FERC-approved SPP Tariff Schedule 11. Transource Missouri's construction of the Projects is economically feasible by virtue of the cost/benefit analysis conducted by SPP, as well as its FERC-approved cost allocation methodology under its Tariff Schedule 11.

The Projects as proposed to be built by Transource Missouri are in the public interest, given all the above, as well as the agreement of KCP&L, GMO, and Transource Missouri to follow the provisions of Paragraphs 27, 28, and 29 of the stipulation and agreement regarding the final route of the Sibley-Nebraska City Project.

iii. Ruling

The record weighs in favor of granting the applications with the provisions proposed, including the proposed waivers. The Commission finds no term or condition of the settlement contrary to the public interest. Therefore, the Commission will grant the applications subject to the settlement's provisions as set forth in Appendix 3 and Appendix 4.

C. Consent Order

Appendix 4 sets forth the settlement's provisions that are outside the Commission's authority to mandate. The signatories have clarified that they seek no resolution on the merits for those terms,⁵⁹ and the law encourages freedom of contract and settlements in lieu of litigation.⁶⁰ In that spirit, the statutes provide that any contested case is subject to disposition by consent order as follows.

i. Authority

The signatories argue that a consent order is not authorized for any matter except as described in one statute that does not apply to the Commission. In support, the signatories rely on a reading of Section 536.060, RSMo 2000. That statute's history refutes the signatories' reading.

⁵⁹ EFIS No. 110, *Second Joint Proposed Order and Joint Proposed Consent Order Approving Unanimous Stipulation and Agreement*, page 2 third paragraph. EFIS No. 111, *Joint Suggestions of the Signatories in Support of an Order by the Commission Approving the Unanimous Stipulation and Agreement* page 3 paragraph 6.

⁶⁰ *Walley v. La Plata Volunteer Fire Dep't*, 368 S.W.3d 224, 231 (Mo. App., W.D. 2012).

Section 536.060's current language is the result of a 1995 amendment. The amendment deleted language (in brackets and italics below) and added language (underscored below) as follows.

[Nothing contained in sections 536.060 to 536.095 shall preclude the informal disposition of] Contested cases and other matters involving licensees and licensing agencies described in section 621.045, RSMo, may be informally resolved by consent agreement or agreed settlement or may be resolved by stipulation, consent order, or default, or by agreed settlement where such settlement is permitted by law. Nothing contained in sections 536.060 to 536.095 shall be construed (1) to impair the power of any agency to take lawful summary action in those matters where a contested case is not required by law, or (2) to prevent any agency authorized to do so from assisting claimants or other parties in any proper manner, or (3) to prevent the waiver by the parties (including, in a proper case, the agency) of procedural requirements which would otherwise be necessary before final decision, or (4) to prevent stipulations or agreements among the parties (including, in a proper case, the agency). ^[61]

Informal disposition of all agencies' contested cases was the original subject of that statute as the bracketed and italicized language shows.⁶² The amendment simply added the specified "noncontested cases and other matters [.]"⁶³

Section 536.060, original and current, is expansive. It offers remedies in conformance with the public policy favoring settlement by contractual arrangement. If there were any ambiguity on this issue, the law would require the Commission to read the statute generously in the direction of the intended remedy. The signatories' reading bars resolution by "consent order, or default, or by agreed settlement" in all contested cases, except the specified matters, which furthers no conceivable beneficial end. Therefore, the Commission concludes that a contested case before the Commission is subject to disposition by consent order—just as it is subject to disposition by stipulation, default, or agreed settlement—under Section 536.060.

⁶¹ 1995 Mo. Laws 1032, 1246 (88th Gen. Assem., 1st Reg. Sess., S.B. 3, Section 536.060).

⁶² The original language provided that the opportunity for hearing: . . . shall not preclude the informal disposition of such case by stipulation, consent order or default, or by agreed settlement where such settlement is permitted by law. 1945 Mo. Laws 1504, 1505 (63rd Gen. Assem., S.B.196, Section 6). Similar language appears in the 1961 Model State Administrative Procedure Act adopted by many states: Unless precluded by law, informal disposition may be made of any contested case by stipulation, agreed settlement, consent order, or default. 15 U.L.A. 1961 *Model State Administrative Procedure Act*, Section 9(d).

⁶³ In response to the amended judgment in *Bodenhausen v. State Bd. of Regis'n for the Healing Arts*, Case No. CV192-1105CC (Jan. 6, 1994, Cir. Ct. Cole Cnty), McHenry, J.; and the affirming opinion in *Bodenhausen v. State Bd. of Regis'n for the Healing Arts*, WD 48914, 1994 WL 532696 (Mo. App., W.D. Oct. 4, 1994). As to the latter action, the Missouri Supreme Court ordered transfer on January 30, 1995. In each action, the court barred informal resolution of contested cases and other matters involving licensees and licensing agencies under section 621.045, RSMo. The Missouri Supreme Court issued its decision on May 30, 1995, also affirming the judgment. *Bodenhausen v. Missouri Bd. of Regis'n for the Healing Arts*, 900 S.W.2d 621 (Mo. banc 1995).

ii. Characteristics

The signatories describe the properties of a consent order by comparison to a consent judgment. The analogy is correct. The analogous properties, as described by the signatories, include the following.

Missouri courts have held that a judgment by consent “is based on an agreement between the parties as to the terms, amount or conditions of the judgment to be rendered.” In this context it is important to recognize: “Consent decrees do not arise from a judicial determination of the rights of the parties or the merits of the case [.]” It is also important to note: “A consent judgment needs no cause or consideration other than an adjustment of differences and a desire to set at rest all possibility of litigation. In exchange for the saving of cost and elimination of risk, the parties each give up something that they might have won had they proceeded with litigation.” ^[64]

Also, a judgment issued pursuant to the parties’ agreement does not aggrieve any such party so, if aggrevement is necessary for standing to appeal, no appeal is available to any such party.⁶⁵ In Missouri, a consent judgment has the same force and effect as any other judgment.⁶⁶

In Missouri, whenever the issue has arisen, the courts have applied the analogy between a consent judgment and a consent order. For example, the courts hold that a consent order does not constitute the agency’s decision on the merits but, at most, a review as to whether a parties’ agreement comports with the public policy entrusted to the respective agencies.⁶⁷ Further, where the General Assembly has comprehensively delegated the regulation of a subject matter to an agency, that agency is the first resort for enforcing settlement of an action before that agency.⁶⁸

iii. Ruling

As the signatories note, chapter 536, RSMo, applies when chapters 386 and 393 provide nothing to the contrary.⁶⁹ The signatories also note that “approval of the [settlement] here would not be inconsistent with the concept of a consent order [.]” ⁷⁰ Therefore, the Commission will order memorialize the proposed provisions that are beyond the Commission’s authority as a consent order, as set forth in Appendix 3. As explained in part III.A of this report and order, the approval procedure that the Commission applies in this action is based on the approval that the parties asked for, the authorities that they cited, and the documents that they filed. That procedure does not necessarily apply under any other relief, law, or facts.

⁶⁴ EFIS No. 111, *Joint Suggestions of the Signatories in Support of an Order by the Commission Approving the Unanimous Stipulation and Agreement* page 6 paragraph 13.

⁶⁵ *Strawhun v. Strawhun*, 164 S.W.3d 536 (Mo. App., S.D. 2005).

⁶⁶ *Household Fin. Corp. v. Jenkins*, 213 S.W.3d 194, 196 (Mo. App., E.D. 2007).

⁶⁷ *Seifner v. Treasurer of State-Custodian of Second Injury Fund*, 362 S.W.3d 59, 65 (Mo. App., W.D. 2012).

⁶⁸ *State ex rel. St. Joseph School Dist. v. Missouri Dept. of Elem. And Sec. Educ.*, 307 S.W.3d 209, 213-17 (Mo. App., W.D. 2010). filing

⁶⁹ *State ex rel. Praxair, Inc. v. Missouri Pub. Serv. Comm’n*, 344 S.W.3d 178, 184 (Mo. 2011).

⁷⁰ EFIS No. 111, *Joint Suggestions of the Signatories in Support of an Order by the Commission Approving the Unanimous Stipulation and Agreement* page 6 paragraph 13.

THE COMMISSION ORDERS THAT:

1. Disposition of the applications by settlement is approved.
2. Transfer Application. The *Application of Kansas City Power & Light Company and KCP&L Greater Missouri Operations Company* ("transfer application") is granted. The transfer of the items as described in the transfer application is authorized. This paragraph includes the notices to construct as described in the transfer application.
3. The *Application of Transource Missouri, LLC for a Certificate of Convenience and Necessity and Request for Waiver* ("CCN application") is granted. A certificate of convenience and necessity for the projects, as described in the CCN application, shall issue to Transource Missouri, LLC.
4. The following are incorporated into this report and order as if fully set:
 - a. *Non-Unanimous Stipulation and Agreement*;
 - b. *First Amendment to Non-Unanimous Stipulation and Agreement*; and
 - c. *Second Joint Proposed Order and Joint Proposed Consent Order Approving Unanimous Stipulation and Agreement*.
5. Ordered paragraphs 1, 2, 3, and 4, are subject to the provisions of Appendix 3 and Appendix 4.
6. This order shall become effective on September 6, 2013.

R. Kenney, Chm., Jarrett, Stoll, and
W. Kenney, CC., concur;
and certify compliance with the provisions
of Section 536.080, RSMo.

Dated at Jefferson City, Missouri, on
this 7th day of August, 2013.

**Appendix 1:
Appearances**

<i>Party</i>	<i>Counsel</i>	<i>Counsel's Address</i>
A. Applicants		
Kansas City Power & Light Company	Roger W. Steiner	1200 Main, PO Box 418679, Kansas City, MO 64141-9679
KCP&L Greater Missouri Operations Company		
Transource Missouri, LLC	Karl Zobrist	4520 Main, Suite 1100, Kansas City, MO 64111
	Lisa A. Gilbreath	
	Larry W. Brewer	400 West 15 th Street, Suite 1500, Austin, TX 78701
B. Parties under 4 CSR 240-2.010(10)		
Staff of the Commission	Steven Dottheim	200 Madison Street, Suite 800, Jefferson City, MO 65102
	Nathan Williams	
Office of the Public Counsel	Lewis Mills	P.O. Box 2230, 200 Madison Street, Suite 650, Jefferson City, MO 65102
C. Intervenors		
AG Processing, Inc. a Cooperative and Midwest Energy Users' Group	Stuart Conrad	3100 Broadway, Suite 1209, Kansas City, MO 64111
Midwest Energy Consumers Group	David Woodsmall	807 Winston Court, Jefferson City, MO 65101
Missouri Department of Natural Resources	Jessica L. Blome	221 W. High Street P.O. Box 899 Jefferson City, MO 65102
Missouri Industrial Energy Consumers	Diana M. Vuylsteke	211 N. Broadway, Suite 3600 St. Louis, MO 63102

Appendix 2: Statutes cited by the Signatories

386.250. The jurisdiction, supervision, powers and duties of the public service commission herein created and established shall extend under this chapter:

(1) [To] electric plants, and to [entities] owning, leasing, operating or controlling the same;

* * *

(7) To such other and further extent, and to all such other and additional matters and things, and in such further respects as may herein appear, either expressly or impliedly.

386.310. 1. The commission shall have power, after a hearing . . . to require every . . . public utility to maintain and operate its . . . plant . . . in such manner as to promote and safeguard the health and safety of its employees, customers, and the public, and to this end to prescribe . . . appropriate safety and other devices or appliances, to establish uniform or other standards of equipment, and to require the performance of any other act which the health or safety of its employees, customers or the public may demand [.]

386.610. . . . The provisions of this chapter shall be liberally construed with a view to the public welfare, efficient facilities and substantial justice between patrons and public utilities.

393.130. 1. [E]very electrical corporation . . . shall furnish and provide such service instrumentalities and facilities as shall be safe and adequate and in all respects just and reasonable. All charges made or demanded by any such . . . electrical corporation . . . for . . . electricity . . . rendered or to be rendered shall be just and reasonable and not more than allowed by law or by order or decision of the commission. Every unjust or unreasonable charge made or demanded for . . . electricity . . . or in connection therewith, or in excess of that allowed by law or by order or decision of the commission is prohibited.

2. No . . . electrical corporation . . . shall directly or indirectly by any special rate, rebate, drawback or other device or method, charge, demand, collect or receive from any person or corporation a greater or less compensation for . . . electricity . . . or for any service rendered or to be rendered or in connection therewith, except as authorized in this chapter, than it charges, demands, collects or receives from any other person or corporation for doing a like and contemporaneous service with respect thereto under the same or substantially similar circumstances or conditions.

3. No . . . electrical corporation . . . shall make or grant any undue or unreasonable preference or advantage to any person, corporation or locality, or to any particular description of service in any respect whatsoever, or subject any particular person, corporation or locality or any particular description of service to any undue or unreasonable prejudice or disadvantage in any respect whatsoever [.]

393.140. The commission shall:

(1) Have general supervision of all . . . electrical corporations . . . having authority under any special or general law or under any charter or franchise to lay down, erect or maintain wires, pipes, conduits, ducts or other fixtures in, over or under the streets, highways and public places of any municipality, for the purpose of . . . transmitting electricity for light, heat or power, or maintaining underground conduits or ducts for electrical conductors, . . . , and all . . . electric plants . . . owned, leased or operated by any electrical corporation [.]

(2) [E]xamine or investigate the methods employed by such persons and corporations in manufacturing, distributing and supplying . . . electricity for light, heat or power and in transmitting the same, . . . , and have power to order such reasonable improvements as will best promote the public interest, preserve the public health and protect those using such . . . electricity, . . . and those employed in the manufacture and distribution thereof, and have power to order reasonable improvements and extensions of the works, wires, poles, pipes, lines, conduits, ducts and other reasonable devices, apparatus and property of . . . electrical corporations [.]

(3) Have power . . . to prescribe from time to time the efficiency of the electric supply system, of the current supplied and of the lamps furnished by the persons or corporations generating and selling electric current [.]

(4) Have power, in its discretion, to prescribe uniform methods of keeping accounts, records and books, to be observed by . . . electrical corporations . . . engaged in the manufacture, sale or distribution of . . . electricity for light, heat or power [.]

(5) [To determine whether] rates or charges or the acts or regulations of any such persons or corporations are unjust, unreasonable, unjustly discriminatory or unduly preferential or in any wise in violation of any provision of law, [and] determine and prescribe the just and reasonable rates and charges thereafter to be in force for the service to be furnished, notwithstanding that a higher rate or charge has heretofore been authorized by statute, and the just and reasonable acts and regulations to be done and observed; and whenever the commission shall be of the opinion, after a hearing had upon its own motion or upon complaints, that the property, equipment or appliances of any such person or corporation are unsafe, insufficient or inadequate, the commission shall determine and prescribe the safe, efficient and adequate property, equipment and appliances thereafter to be used, maintained and operated for the security and accommodation of the public and in compliance with the provisions of law and of their franchises and charters.

* * *

(8) Have power . . . after hearing, to prescribe by order the accounts in which particular outlays and receipts shall be entered, charged or credited.

* * *

(11) Have power to require every . . . electrical corporation . . . to file with the commission and to print and keep open to public inspection schedules showing all rates and charges made, established or enforced or to be charged or enforced, all forms of contract or agreement and all rules and regulations relating to rates, charges or service used or to be used, and all general privileges and facilities granted or allowed by such . . . electrical corporation [.] The commission shall have power to prescribe the form of every such schedule, and from time to time prescribe by order such changes in the form thereof as may be deemed wise [.]

Appendix 3: Conditions Determined on the Merits

The Commission grants the CCN application and the transfer application subject to the following provisions, as drawn verbatim from the *Second Joint Proposed Order and Joint Proposed Consent Order Approving Unanimous Stipulation and Agreement*,⁷¹ which are subject to the report and order. The parties refer to the settlement, defined in the body of this report and order, as the “Unanimous Stipulation and Agreement” the “Unanimous First Amendment [.]”

1. The Unanimous Stipulation and Agreement, attached hereto as Attachment 1, and the Unanimous First Amendment to that Stipulation, attached hereto as Attachment 2, are approved and adopted, and the signatory parties are ordered to comply with their terms. The Commission is not a party to the Stipulation and only approves the agreements that have been entered into by the Signatories.

2. KCP&L and GMO’s Transfer Application is granted conditioned upon the terms of the Unanimous Stipulation and Agreement and the Unanimous First Amendment, including the Commission making specific findings after the final selection of the Sibley-Nebraska City route.

3. KCP&L and/or GMO shall file a copy of the final purchase agreement, detail of the costs included in CWIP, and detail of the property to be transferred at the time of transfer of the Projects’ facilities.

4. To the extent that the SPP NTCs regarding the Projects are assets, the Commission approves KCP&L and GMO’s plans to novate those NTCs.

5. The Commission’s Affiliate Transactions Rule sections 4 CSR 240-20.015(2)(A)2, 4 CSR 240-20.015(2)(B), and 4 CSR 240-20.015(3)(C)4 are waived with respect to:

- a. The transfer, license, or assignment of transmission assets, easements, or right of ways (or use thereof) owned by GMO or KCP&L associated with the Projects;
- b. Materials and services provided by KCP&L or GMO to Transource, Transource Missouri, or a subsidiary for the Projects prior to novation or transfer of the cost of the Projects to Transource Missouri; and
- c. Information, assets, goods, and services provided by KCP&L or GMO to Transource, Transource Missouri, or a subsidiary until the Projects are in service.

6. The Commission’s Affiliate Transactions Rule sections 4 CSR 240-20.015(2)(A)2, 4 CSR 240-20.015(2)(B), and 4 CSR 240-20.015(3)(C)4 are waived to the extent necessary to allow KCP&L and GMO to use a 20% markup to their fully distributed cost methodology in lieu of using the fair market value under the Rule with respect to:

⁷¹ EFIS No. 110, page 14 through 16, part I.D., paragraphs 1 through 11.

- a. Non-Project goods and services (if the Signatories cannot agree regarding the reasonableness of these charges, this matter shall be taken to the Commission for resolution);⁷² and
- b. Information, assets, goods, and services provided by KCP&L or GMO to Transource, Transource Missouri, or a subsidiary for the Projects after they are in service.

7. KCP&L and GMO shall file for Commission approval of their cost allocation manuals (“CAMs”) before providing any information, assets, goods, and services to Transource or Transource Missouri after either the novation or transfer of the cost of the Projects, whichever occurs first, but KCP&L and GMO may provide to Transource or Transource Missouri information, assets, goods, and services in a manner consistent with the provisions of the Stipulation prior to Commission approval of their CAMs.⁷³

8. Transource Missouri’s CCN Application is granted conditioned upon the terms of the Unanimous Stipulation and Agreement and the Unanimous First Amendment, including the Commission making specific findings after the final selection of the Sibley-Nebraska City route.

9. Transource Missouri shall provide the Commission with the 4 CSR 240-3.105 information for the Sibley-Nebraska City route as soon as that information is available.

10. The reporting requirements of 4 CSR 240-3.175, Submission Requirements For Electric Utility Depreciation Studies, are waived subject to the Stipulation’s provision regarding Staff’s and OPC’s access to documents.

11. Subsections 4 CSR 240-3.190 (1), (2), and (3)(A)-(D), Reporting Requirements For Electric Utilities And Rural Electric Cooperatives, are waived for Transource Missouri.

⁷² Although the Signatories have not expressly requested a waiver of the Rule in Paragraph 6 of the Stipulation, the Commission finds that the provisions of Paragraph 6 propose treating non-Project goods and services in a manner different from the requirements of the Rule and, therefore, the Commission will treat Paragraph 6 as requesting a waiver of the Rule to the extent of its provisions.

⁷³ Transcript, Vol. 2 at 108-10; 4 CSR 240-20.015(3)(D), 4 CSR 240-20.015(10)(A)2.B.

Appendix 4: Consent Order

The Signatories agree to a grant of the CCN application and the transfer application subject to the following provisions, drawn verbatim from the *Second Joint Proposed Order and Joint Proposed Consent Order Approving Unanimous Stipulation and Agreement*,⁷⁴ and the settlement, which are subject to the provisions of the report and order.

1. The Stipulation contains a series of agreements among the Signatories that, among other things, require them (particularly the Applicants) to fulfill certain obligations. The Stipulation also specifies the establishment of certain regulatory liabilities and the manner of their future treatments. The Stipulation provides a process for administering affiliate transactions between the Signatories and related parties.

2. In particular, Section II(A) of the Stipulation provides for certain rate treatment respecting costs allocated to KCP&L or GMO by SPP involving FERC items such as authorized return on equity ("ROE"), capital structure, construction work in progress ("CWIP"), or other FERC transmission rate incentives for the Iatan-Nashua Project and the Sibley-Nebraska City Project facilities located in KCP&L's and GMO's respective service territories that are constructed by Transource Missouri. KCP&L and GMO have agreed to make these adjustments in all rate cases so long as the transmission facilities are in service.

A. Rate Treatment – Affiliate Owned Transmission

1. With respect to transmission facilities located in KCP&L certificated territory that are constructed by Transource Missouri that are part of the Iatan-Nashua and Sibley-Nebraska City Projects, KCP&L agrees that for ratemaking purposes in Missouri the costs allocated to KCP&L by SPP will be adjusted by an amount equal to the difference between: (a) the SPP load ratio share of the annual revenue requirement for such facilities that would have resulted if KCP&L's authorized ROE and capital structure had been applied and there had been no Construction Work in Progress ("CWIP") (if applicable) or other FERC Transmission Rate Incentives, including but not limited to Abandoned Plant Recovery, recovery on a current basis instead of capitalizing pre-commercial operations expenses and accelerated depreciation, applied to such facilities; and (b) the SPP load ratio share of the annual FERC-authorized revenue requirement for such facilities. KCP&L will make this adjustment in all rate cases so long as these transmission facilities are in service.

⁷⁴ EFIS No. 110, page 16 through 18, section II, paragraphs 1 through 8.

2. With respect to transmission facilities located in GMO certificated territory that are constructed by Transource Missouri that are part of the Iatan-Nashua and Sibley-Nebraska City Projects, GMO agrees that for ratemaking purposes in Missouri the costs allocated to GMO by SPP will be adjusted by an amount equal to the difference between: (a) the SPP load ratio share of the annual revenue requirement for such facilities that would have resulted if GMO's authorized ROE and capital structure had been applied and there had been no CWIP (if applicable) or other FERC Transmission Rate Incentives, including but not limited to Abandoned Plant Recovery, recovery on a current basis instead of capitalizing pre-commercial operations expenses and accelerated depreciation, applied to such facilities; and (b) the SPP load ratio share of the annual FERC-authorized revenue requirement for such facilities. GMO will make this adjustment in all rate cases so long as these transmission facilities are in service.

3. Sections II(B) and II(D) address issues under the Commission's Affiliate Transactions Rule, 4 CSR 240-20.015 ("Rule"). The Signatories agreed that provisions of the Affiliate Transactions Rule, 4 CSR 240-20.015, should apply to transactions between KCP&L and GMO on the one hand, and GPE, Transource, and Transource's utility subsidiaries on the other hand, except for the waivers as provided for in Paragraphs 4 through 6, and 11 through 13 of the Stipulation. All Signatories reserved the right to seek or oppose additional waivers for other projects (i.e., projects other than the Iatan-Nashua Project and the Sibley-Nebraska City Project) from the Affiliate Transactions Rule in the future.⁷⁵

B. Affiliate Transactions Rule

3. The provisions of the Affiliate Transactions Rule, 4 CSR 240-20.015, shall apply to transactions between KCP&L and GMO on the one hand, and GPE, Transource Missouri, and Transource Missouri's utility subsidiaries on the other hand, except for the waivers as provided for in paragraphs 4 through 6, and 11 through 13. All Signatories reserve the right to seek or oppose additional waivers for other projects (i.e., projects other than the Projects) from the Affiliate Transactions Rule in the future.

⁷⁵ Transcript, Vol. 2 (Apr. 16, 2013) at 103-09; 4 CSR 240-20.015(10); 4 CSR 240-2.060(4).

4. The Signatories request that the Commission waive 4 CSR 240-20.015(2)(A)2, 4 CSR 240-20.015(2)(B), and 4 CSR 240-20.015(3)(C)4 with respect to transfer, license, or assignment of easements or right of ways (or use thereof, including joint usage where KCP&L/GMO are using the easement or right of way and permit Transource Missouri to use the same easement or right of way) owned by GMO or KCP&L associated with the Projects. The affiliate transactions referenced in this paragraph are subject to the provisions of paragraph 7.

5. The Signatories request that the Commission waive 4 CSR 240-20.015(2)(A)2, 4 CSR 240-20.015(2)(B), and 4 CSR 240-20.015(3)(C)4 with respect to materials and services (including, but not limited to, usage of KCP&L/GMO employees, contracted labor/services, vehicles, equipment, and facilities) provided by KCP&L or GMO to Transource Missouri, Transource Missouri, or a subsidiary for the Projects prior to novation or transfer of the cost of the Projects to Transource Missouri. The providing entity shall be compensated for these materials and services including Allowance for Funds Used During Construction ("AFUDC") and capitalized property taxes at its fully distributed cost at the time of transfer of the cost of the Projects.

6. The Signatories agree that non-Project goods and services (defined as goods and services that are not directly related to the Projects) were to be provided and are to be provided at the higher of fair market value or fully distributed cost by KCP&L to Transource Missouri, Transource Missouri, and GPE prior to the novation or transfer of the cost of the Projects. KCP&L and GMO will, by June 1, 2013, ensure that charges to Transource Missouri, Transource Missouri, and GPE regarding the development and formation of Transource Missouri and Transource Missouri reflect the higher of fair market value or the fully distributed cost. The Signatories agree that KCP&L and GMO can use a 20% markup to their fully distributed cost methodology for such goods and services in lieu of using the fair market value. If the Signatories cannot agree regarding the reasonableness of these charges, this matter will be taken to the Commission for resolution. In support of the resolution of the treatment for non-Project goods and services provided prior to the novation or transfer of the cost of the Projects, KCP&L and GMO will contribute a total of \$50,000 to the State School Fund or a mutually agreeable organization. This contribution will not be recovered from KCP&L and GMO customers. The Signatories agree that all outstanding issues related to the provision of non-Project

goods and services to Transource Missouri, Transource Missouri, and GPE prior to the novation or transfer of the cost of the Projects are resolved, except as provided in this paragraph.

7. Transource Missouri will pay GMO the higher of \$5.9 million or net book value for transferred transmission assets, easements, and right-of-ways that have been previously included in the rate base and reflected in the retail rates of KCP&L and GMO customers. KCP&L and GMO agree to book a regulatory liability reflecting the value of this payment to the extent it exceeds net book value. This regulatory liability shall be amortized over three years beginning with the effective date of new rates in KCP&L's and GMO's next retail rate cases.

D. KCP&L Operations Specific to the Projects

11.If KCP&L assists Transource Missouri for the Projects in communicating with local landowners in the KCP&L and GMO certificated service territories, with local governmental authorities, and with other members of the public, or if KCP&L continues to provide ongoing construction management, cost control management, engineering services, construction services, procurement of materials, and related services for the Projects, the Signatories request that the Commission waive 4 CSR 240-20.015(2)(A)2, 4 CSR 240-20.015(2)(B), and 4 CSR 240-20.015(3)(C)4 with respect to information, assets, goods, and services (including, but not limited to, usage of KCP&L or GMO employees, contracted labor/services, vehicles, equipment, and facilities) provided by KCP&L or GMO to Transource Missouri, Transource Missouri, or a subsidiary until the Projects are in service. These materials and services will be provided at fully distributed cost until the Projects are in service. For the purposes of this paragraph and paragraph 12, "in service" is defined as the commercial operation date for each of the Projects.

12.If KCP&L provides operations and maintenance services and related capital for the Projects after they are in service, it will do so in a manner consistent with the application of the Commission's Affiliate Transactions Rule, except that the Signatories request that the Commission waive 4 CSR 240-20.015(2)(A)2, 4 CSR 240-20.015(2)(B), and 4 CSR 240-20.015(3)(C)4 with respect to information, assets, goods, and services (including, but not limited to, usage of KCP&L or GMO employees, contracted labor/services, vehicles, equipment, and facilities) provided by KCP&L or GMO to Transource Missouri, Transource Missouri, or a subsidiary to the extent

necessary to allow KCP&L and GMO to use a 20% markup to their fully distributed cost methodology in lieu of using the fair market value.

13. KCP&L and GMO shall file for Commission approval of their Cost Allocation Manuals ("CAM") before providing any information, assets, goods, and services to Transource Missouri or Transource Missouri after either the novation or transfer of the cost of the Projects, whichever occurs first. The Signatories agree that KCP&L and GMO can provide information, assets, goods, and services to Transource Missouri or Transource Missouri in a manner consistent with the provisions of this Stipulation prior to Commission approval of the CAM.

4. The Signatories have agreed to certain payments to be made by Transource Missouri, KCP&L and GMO, including their regulatory treatment.⁷⁶ The Signatories have also agreed to other procedures that KCP&L, GMO, Transource Missouri, and their affiliates will follow with regard to the Projects.

5. The Stipulation contains provisions regarding the future operations of the Applicants in Section II(C), reporting requirements in Section II(E), and access by Staff and OPC to the books and records of Transource Missouri and Transource Energy in Section II(F). There are additional conditions in Section II(G) regarding the final selection of the route of the Sibley-Nebraska City Project, as well as public outreach efforts related to the siting, routing, easement acquisition and right-of-way acquisition for the Projects.

C. Transource Missouri Operations/Future Transfer

8. Transource Missouri will not pursue future transmission projects that are subject to a right of first refusal ("ROFR") in the KCP&L and GMO respective certificated service territories.

⁷⁶ Stipulation, Paragraph II(B)(7) at p. 7: "Transource Missouri will pay GMO the higher of \$5.9 million or net book value for transferred transmission assets, easements, and right-of-ways that have been previously included in the rate base and reflected in the retail rates of KCP&L and GMO customers. KCP&L and GMO agree to book a regulatory liability reflecting the value of this payment to the extent it exceeds net book value. This regulatory liability shall be amortized over three years beginning with the effective date of new rates in KCP&L's and GMO's next retail rate cases." Stipulation, Paragraph II(B)(6) at p. 6: "... KCP&L and GMO will contribute a total of \$50,000 to the State School Fund or a mutually agreeable organization. This contribution will not be recovered from KCP&L and GMO customers."

9. KCP&L and GMO will pursue future transmission projects subject to ROFR in their respective certificated service territories. KCP&L or GMO may seek a waiver from the provisions of this paragraph from the Commission for good cause.

10. Transource Missouri agrees to seek approval from the Commission for any subsequent transfer of the Projects' facilities.

E. Additional Reporting and Provision of Information
Regarding the Projects

14. KCP&L will file a copy of the final purchase agreement, detail of the costs included in CWIP, and detail of the property to be transferred at the time of transfer of the Projects' facilities.

15. KCP&L, GMO, and/or Transource Missouri will continue coordinated efforts with Omaha Public Power District until the details of the routing and interception point for the Sibley-Nebraska City line are finalized.

16. KCP&L, GMO, and/or Transource Missouri will provide to Staff and OPC the Sibley-Nebraska City Project cost control budget estimate in the fourth Quarter of 2013.

17. KCP&L, GMO, and/or Transource Missouri will continue to file quarterly status reports on the Iatan-Nashua Project to the Commission, as KCP&L and GMO are doing in File No. EO-2012-0271.

18. KCP&L, GMO, and/or Transource Missouri will file in File No. EA-2013-0098, or other case as designated by the Commission, quarterly status reports on the Sibley-Nebraska City Project to the Commission consistent with those provided by KCP&L and GMO in File No. EO-2012-0271.

19. Updates to SPP regarding the Projects are now being entered on a quarterly basis directly into SPP's Transmission and Generation Interconnection Tracking ("TAGIT") project tracking database through a secure interface. SPP reviews the updates and includes them in its quarterly Project Tracking Reports, which are publicly available on SPP's website. Transource Missouri will provide to Staff and OPC any other periodic updates required by SPP regarding the Projects that are not included in the publicly available quarterly Project Tracking Reports.

F. Access to Books and Records Necessary for the
Commission to Perform Its Statutory Duties

20. Transource Missouri will produce in Missouri, upon reasonable notice, duplicate copies of Transource Missouri's and Transource Missouri's books and records.

21. Transource Missouri will provide Staff and OPC access to the following documents, including but not limited to: (a) Meeting Minutes of, and Materials distributed at, the Transource Missouri Board of Managers and Members (including Committee Minutes and Materials); (b) Meeting Minutes of, and Materials distributed at, the Transource Missouri Board of Managers and Members (including Committee Minutes and Materials); (c) Workpapers of the external auditors of Transource Missouri; (d) Workpapers of the external auditors of Transource Missouri; (e) General Ledger (provided electronically) of Transource Missouri; (f) General Ledger (provided electronically) of Transource Missouri; (g) Chart of Accounts and Written Accounting Policies of Transource Missouri; (h) Chart of Accounts and Written Accounting Policies of Transource Missouri; (i) Organizational Charts of Transource Missouri; (j) Organizational Charts of Transource Missouri; (k) Total Company and Missouri Jurisdictional Financial Statements (Income Statement, Balance Sheet, Statement of Cash Flows) on a Quarterly Basis of Transource Missouri; (l) Total Company and Missouri Jurisdictional Financial Statements (Income Statement, Balance Sheet, Statement of Cash Flows) on a Quarterly Basis of Transource Missouri; (m) Monthly Operating/Financial Reports of Transource Missouri (used for internal reporting of the utility ongoing operations and earnings results); (n) Monthly Operating/Financial Reports of Transource Missouri (used for internal reporting of the utility ongoing operations and earnings results); (o) Construction and Operating Budgets for the Current and Succeeding Three Years of Transource Missouri; (p) Construction and Operating Budgets for the Current and Succeeding Three Years of Transource Missouri; (q) Federal and Missouri Income Tax Returns of Transource Missouri; and (r) Federal and Missouri Income Tax Returns of Transource Missouri.

22. Transource Missouri will work with Staff to provide office space in Columbus, Ohio if it is more efficient for the Staff to perform its duties in Columbus, rather than by reviewing copies of books and records provided in Missouri.

23. New or updated agreements between the Applicants that are executed after the approval of the settlement agreement in this case will be provided to the Signatories as they become available.

G. Additional Conditions Agreed to for Approval of
Applications

24. GMO agrees to establish a regulatory liability reflecting the amount collected in retail customer rates for the transferred property from the date of the novation or transfer of the costs of the Projects until new GMO rates are established. The treatment of the regulatory liability will be determined in GMO's next retail rate case.

25. Transource Missouri requested that the Commission grant approval of the CCN Application conditioned upon: (a) PSC approval of the transfer requests in File No. EO-2012-0367; (b) SPP's approval of Transource Missouri as a transmission owning member; (c) novation of the NTCs to Transource Missouri; and (d) FERC's acceptance of the novation agreements.

26. KCP&L and GMO requested that the Commission grant approval of the Transfer Application conditioned upon: (a) Transource Missouri obtaining the necessary approvals to construct the Projects; (b) Transource Missouri executing the SPP Membership Agreement as a Transmission Owner; (c) SPP's approval of the novation of the NTCs to Transource Missouri; and (d) FERC's acceptance of the novation agreements.

27. The Signatories agree that it would be reasonable for the Commission to grant conditional approval of KCP&L and GMO's Transfer Application and Transource Missouri's CCN Application prior to the final selection of route for the Sibley- Nebraska City Project. The Signatories request that the Commission grant approval conditioned upon the Commission making specific findings, through means determined at the Commission's discretion, after the final selection of the Sibley- Nebraska City route has been made, that the Transfer Application is not detrimental to the public interest and that the CCN Application is necessary and convenient for the public service. Transource Missouri shall provide the Commission with the 4 CSR 240-3.105 information for the Sibley-Nebraska City route as soon as that information is available.

28. Nothing in this Stipulation restricts any Signatory's right to request reasonable additional notice, local public hearings, or additional processes in these cases. No Signatory is restricted from opposing such request to the Commission.

29. KCP&L and GMO will provide the Commission with a report and information in File No. EA-2013-0098 within 90 days of the effective date of a Commission order approving this Stipulation outlining its public outreach efforts for siting, routing, easement acquisition and right-of-way acquisition for the Projects. KCP&L and GMO will update the report at least quarterly thereafter.

6. The Commission has thoroughly reviewed the terms of the Stipulation, as well as the Signatories' Joint Memorandum in Support of the Stipulation and other submissions which they have submitted jointly and individually. The Commission has also reviewed the hearing exhibits that have been entered into the record in this case. Based upon its review of the record and the Stipulation, the Commission independently finds and concludes that the Stipulation's proposed terms are in the public interest, and that they are necessary and convenient for the public service.

7. Although the Commission's review and approval of the Stipulation does not mean that it is issuing a decision on the merits of each of the individual elements of the Stipulation, the Commission finds that the agreement entered into by the Signatories is fair and reasonable, is not detrimental to the public interest, and serves the necessity and convenience of the public.

8. The Commission finds that the actions that the Stipulation requires the Applicants to take, and the process and procedures that the Signatories have agreed to follow as the Projects are constructed and operated all relate to the promotion of efficient facilities to serve the public, and they achieve substantial justice between patrons and public utilities. PSC v. Missouri Gas Energy, 388 S.W.3d 221, 228 (Mo. App. W.D. 2012), citing Section 386.610. Consequently, it is in the public interest for the Commission to approve the Stipulation as submitted by the Signatories.

**In the matter of Union Electric Company d/b/a AmerenUE's Purchased Gas Adjustment Factors to be Audited in its 2006-2007 Actual Cost Adjustment.
File No. GR-2008-0107**

**In the matter of Union Electric Company d/b/a AmerenUE's Purchased Gas Adjustment Factors to be Audited in its 2007-2008 Actual Cost Adjustment.
File No. GR-2008-0366**

**In the matter of Union Electric Company d/b/a Ameren Missouri's Purchased Gas Adjustment Factors to be Audited in its 2008-2009 Actual Cost Adjustment.
File No. GR-2009-0337**

**In the matter of Union Electric Company d/b/a Ameren Missouri's Purchased Gas Adjustment Factors to be Audited in its 2009-2010 Actual Cost Adjustment.
File No. GR-2010-0180**

**In the matter of Union Electric Company d/b/a Ameren Missouri's 2010-2011 ACA Audit.
File No. GR-2012-0077**

**In the Matter of Laclede Gas Company's Purchased Gas Adjustment for 2006-2007
File No. GR-2008-0140**

**In the Matter of Laclede Gas Company's Purchased Gas Adjustment for 2007-2008
File No. GR-2008-0387**

**In the Matter of Laclede Gas Company's Purchased Gas Adjustment for 2008-2009
File No. GR-2010-0138**

**In the Matter of Laclede Gas Company's PGA Factors to be Reviewed in Its 2009-2010 ACA Filing
File No. GR-2011-0055**

**In the Matter of Laclede Gas Company's Purchased Gas Adjustment for 2010-2011
File No. GR-2012-0133**

GAS

§17.1. Purchased Gas Adjustment (PGA)

When retail gas sellers settled their dispute with a wholesale gas seller, the retail gas sellers sought orders from the Commission related to the retail sellers' purchased gas adjustments and actual cost adjustments for several years. The Commission issued an order stating that the Commission will not disallow the overcharged amounts that the retail gas sellers paid to the wholesale gas seller, that the settlement was prudent, and that amounts refunded to the retail gas sellers would go to retail customers through purchased gas adjustments and be included in actual cost adjustments.

**DETERMINATION ON THE PLEADINGS RESPECTING ISSUES
RELATING TO MOGAS PIPELINE, L.L.C.**

Issue Date: August 14, 2013

Effective Date: August 24, 2013

This order concerns five actual cost adjustment cases for Union Electric Company, d/b/a Ameren Missouri and five actual cost adjustment cases for Laclede Gas Company, covering years 2006-2007 through 2010-2011. For each of those ACA cases, the Commission's Staff has proposed an adjustment related to Ameren Missouri and Laclede's attempts to recover overcharged amounts from MoGas Pipeline, L.C.C. (MoGas), the operator of an interstate natural gas pipeline through which Ameren Missouri and Laclede transport gas.

In 2007, acting on Staff's complaint, the Commission issued an order in File No. GC-2006-0491 finding that MoGas' predecessors – Missouri Pipeline, LLC and Missouri Gas Company - had charged their customers a rate that exceeded the amount they were allowed to charge under their tariffs. Subsequently, Ameren Missouri and Laclede obtained judgments in circuit court against MoGas for those overcharges. MoGas contests the validity of the judgments and has perfected an appeal to the Missouri Court of Appeals.

MoGas, Ameren Missouri, and Laclede have now reached a Settlement Agreement whereby MoGas will pay Ameren Missouri \$3,506,000 and Laclede \$3,676,000 within ten days of the satisfaction of all contingencies provided for in their Settlement Agreement. They have also agreed that MoGas will promptly change its senior management by removing MoGas' President, David Ries, from any management role with MoGas.

Neither the Commission, nor its Staff, is a party to the Settlement Agreement. However, the settlement is subject to a condition precedent that requires certain actions by the Commission. Specifically, the Settlement Agreement asks the Commission to enter an order that:

- Determines that it was prudent and reasonable for Ameren Missouri and Laclede to enter into the Settlement Agreement;
- Closes all issues relating to MoGas in these ACA dockets, effective upon issuance of such order, subject to the requirement that, on a going forward basis, Laclede and Ameren Missouri each return the funds to be paid to them by MoGas hereunder to their retail customers through their respective PGA mechanisms;
- Determines that there shall be no disallowance of charges from MoGas to Laclede or Ameren Missouri applicable to transportation services provided by MoGas between July 1, 2003 and May 31, 2008;
- Indicates that, upon the making of the payments required to be paid by MoGas to Ameren Missouri and Laclede as described above, the Commission will dismiss its complaint against MoGas; and
- Remains in effect for thirty (30) days without any motion for reconsideration or appeal being filed by any party or third party.

After receiving Ameren Missouri and Laclede's motion, the Commission ordered its Staff to respond by July 29, 2013. The Commission also ordered that any other party wishing to respond to the motion do so by July 29. Staff filed its response on July 29. No other party responded.

Staff concurs that it was reasonable and prudent for Ameren Missouri and Laclede to enter into the Settlement Agreement with MoGas under the terms described in that agreement. Staff agrees that all MoGas related issues in the pending ACA cases for Ameren Missouri and Laclede should be considered resolved upon MoGas' payment of the funds described in the Settlement Agreement. Staff agrees that there should be no disallowance of charges from MoGas to Ameren Missouri or Laclede applicable to transportation services provided by MoGas between July 1, 2003 and May 31, 2008. Staff does not oppose the dismissal of the Commission's complaint against MoGas in the Circuit Court of Cole County, but points out that the complaint was brought by the Commission and not by Staff. Finally, Staff does not oppose including the payments received from MoGas in Ameren Missouri's and Laclede's ACA balances as provided in the Settlement Agreement.

As Staff explains, the penalty action pending in the Circuit Court of Cole County was brought by the Commission and not by Staff. As a result, only the Commission can decide whether to dismiss that action. After reviewing the Settlement Agreement, the Commission finds that it is appropriate to dismiss that action upon MoGas' payment of the funds described in the Settlement Agreement.

The Commission will grant Ameren Missouri and Laclede's joint motion for determination on the pleadings respecting issues relating to MoGas Pipeline. In doing so, the Commission finds that it was prudent and reasonable for Ameren Missouri and Laclede to enter into the Settlement Agreement.

THE COMMISSION ORDERS THAT:

1. The Joint Verified Motion of Union Electric Company, d/b/a Ameren Missouri, and Laclede Gas Company for a Determination on the Pleadings Respecting Issues Relating to MoGas Pipeline, L.L.C. is granted.

2. All MoGas related issues in all pending ACA cases of Union Electric Company, d/b/a Ameren Missouri, and Laclede Gas Company are resolved effective with this order, subject to the requirement that, on a going forward basis, Ameren Missouri and Laclede return the funds to be paid to them by MoGas Pipeline, L.L.C. pursuant to the Settlement Agreement to their retail customers through their PGA mechanisms as provided in the Settlement Agreement. The ACA cases shall remain open until any non-MoGas related issues are resolved and final ACA balances are established in each such case.

3. There shall be no disallowance of charges from MoGas Pipeline, L.L.C. to Union Electric Company, d/b/a Ameren Missouri, and Laclede Gas Company applicable to transportation services provided by MoGas between July 1, 2003 and May 31, 2008.

4. Upon Ameren Missouri and Laclede filing documents demonstrating that MoGas Pipeline, L.L.C. has made the required payments to Union Electric Company, d/b/a Ameren Missouri, and Laclede Gas Company, the Commission's General Counsel shall file a dismissal of the Commission's complaint against MoGas Pipeline, L.L.C. pending in the Circuit Court of Cole County, Missouri.¹

¹ See section 386.600, RSMo 2000 concerning the Circuit Court's dismissal of Commission actions to recover penalties.

5. The \$3,506,000 payment to be received by Union Electric Company, d/b/a Ameren Missouri, shall be included in Ameren Missouri's ACA balance, allocated as provided for on Attachment 2 to the Joint Motion, and shall be included in Ameren Missouri's ACA factors to be used starting November 1, 2013, if settlement payments are received by September 30, 2013, subject to Staff's confirmation of receipt of the payment and review of allocation factors in the appropriate ACA case.

6. The \$3,676,000 payment to be received by Laclede Gas Company shall be included in Laclede's ACA balance, allocated as provided for on Attachment 3 to the Joint Motion, and shall be included in Laclede's ACA factors to be used starting with the effective date of Laclede's new PGA rates in November 2013, if settlement payments are received by September 30, 2013, subject to Staff's confirmation of receipt of the payment and review of allocation factors in the appropriate ACA case.

7. This order shall become effective on August 24, 2013.

R. Kenney, Chm., Jarrett, Stoll, and
W. Kenney, CC., concur.

Woodruff, Chief Regulatory Law Judge

The Staff of the Missouri Public Service Commission, Complainant, v. Laclede Gas Company, Respondent.

File No. GC-2011-0098

In the Matter of Laclede Gas Company's Purchased Gas Adjustment for 2004-2005

File No. GR-2005-0203

In the Matter of Laclede Gas Company's Purchased Gas Adjustment for 2005-2006

File No. GR-2006-0288

In the Matter of Laclede Gas Company's Purchased Gas Adjustment for 2006-2007

File No. GR-2008-0140

In the Matter of Laclede Gas Company's Purchased Gas Adjustment for 2007-2008

File No. GR-2008-0387

In the Matter of Laclede Gas Company's Purchased Gas Adjustment for 2008-2009

File No. GR-2010-0138

In the Matter of Laclede Gas Company's 2009-2010 Actual Cost Adjustment Filing

File No. GR-2011-0055

In the Matter of Laclede Gas Company's 2010-2011 Actual Cost Adjustment Filing

File No. GR-2012-0133

EXPENSES

**§11. Gas
GAS**

§17.1. Purchased Gas Adjustment (PGA)

The Commission approved revisions to a cost allocation manual as agreed by the parties to a complaint, addressing transactions with wholesale gas sellers, which also affected the resolution of several actions related to purchased gas adjustments and an actual cost adjustment.

**ORDER APPROVING STIPULATION AND AGREEMENT, GRANTING WAIVER,
AND APPROVING COST ALLOCATION MANUAL**

Issue Date: August 14, 2013

Effective Date: August 24, 2013

On July 16, 2013, Laclede Gas Company, the Staff of the Commission, and the Office of the Public Counsel jointly filed a Unanimous Partial Stipulation and Agreement and Waiver Request and Request for Approval of Cost Allocation Manual. The parties filed the stipulation and agreement in eight cases. The first of those cases is GC-2011-0098, which is a complaint filed by Staff against Laclede. The stipulation and agreement would resolve all issues in that complaint and if approved, will result in the dismissal, with prejudice of Staff's complaint and Laclede's counter-claim.

The stipulation and agreement was also filed in seven other cases, which concern Laclede's actual cost adjustments for 2004 through 2011 (the ACA cases). The stipulation and agreement resolves only one issue in the ACA cases. Thus, for the ACA cases, the submitted stipulation and agreement is a partial stipulation and agreement.

The complaint case, GC-2011-0098, was brought by Staff against Laclede alleging that Laclede's Cost Allocation Manual (CAM) fails to comply with the Commission's affiliate transaction rules; that Laclede failed to obtain Commission approval of its CAM; and that Laclede failed to annually submit its CAM to Staff. Laclede filed a counter-claim to Staff's complaint, alleging that Staff did not have a good faith, non-frivolous argument for its position and was therefore in violation of Commission rule 4 CSR 240-2.080(7).

The stipulation and agreement resolves Staff's complaint by submitting for Commission approval a revised CAM that is acceptable to Laclede, Staff, and Public Counsel. It also includes Laclede's agreement to file all current and future versions of its CAM in the Commission's electronic filing system (EFIS), and to notify Staff and Public Counsel of any such filings via e-mail. In addition, Laclede will continue to file in EFIS its annual CAM report detailing its affiliate transactions for the preceding fiscal year. Upon the Commission's approval of the stipulation and agreement, both Staff's complaint and Laclede's counter-claim in EC-2011-0098 will be dismissed with prejudice.

The stipulation and agreement addresses an issue pending in the seven ACA cases by setting forth and asking the Commission to approve a document entitled Gas Supply and Transportation Standards of Conduct. That document would control Laclede's dealings with natural gas suppliers, including its dealings with affiliated suppliers. Among other things, the Standards of Conduct:

- Require that all multi-month (longer than one-month) purchases of gas by Laclede from any supplier, including an affiliate, be done only through a competitive bid and award process;
- Require that all short-term (one-month or less) purchases of gas by Laclede from any supplier, including an affiliate, be done through a competitive bid and award process, except for emergency short-term purchases;

- Detail the bidding practices, supplier diversity, credit, reliability considerations, and other information that must be contemporaneously documented, maintained, and provided by Laclede to make such a determination for multi-month or short-term gas purchases;
- Detail the contemporaneous documentation requirements and information exchange process for sales of gas supply;
- Detail how Laclede's releases and purchases of transportation and storage capacity are to be conducted; and
- Detail how purchases of unsolicited gas supply are to be considered and documented.

In addition to concerns about future transactions that are addressed in the Standards of Conduct, the seven pending ACA cases also contain issues about past affiliate transactions between Laclede and its affiliated gas marketing company, Laclede Energy Resources (LER). The stipulation and agreement provides that those issues are to be considered resolved in each of the ACA cases with no adjustment to Laclede's ACA balances, provided that Laclede shall file the tariff modification set forth in Appendix 3 to the stipulation and agreement. That tariff modification will reduce the percentage of Off-System Sales/Capacity Release net margins retained by Laclede during its next three fiscal years beginning October 1, 2013 from 15 percent to zero percent for the first two million dollars in such net margins. The parties agree that those percentages will not be changed for three years except in limited circumstances.

The signatories to the stipulation and agreement believe that Laclede's compliance with the practices, processes, and procedures set forth in the Gas Supply and Transportation Standards of Conduct should result in prices that are consistent with the Commission's Affiliate Transaction Rules, 4 CSR 240-40.015 and 4 CSR 240-40.016. For that reason, the signatories ask the Commission to grant Laclede a variance, as more fully described in the stipulation and agreement, from the provisions of that rule pertaining to "fully distributed cost". Such variances are allowed by the rule¹ and the Commission will grant the requested variances.

After reviewing the stipulation and agreement, the Commission independently finds and concludes that such stipulation and agreement is in the public interest and should be approved.

THE COMMISSION ORDERS THAT:

1. The Stipulation and Agreement filed on July 16, 2013, is approved as a resolution of the issues addressed in that stipulation and agreement. The signatory parties are ordered to comply with the terms of the stipulation and agreement. A copy of the stipulation and agreement is attached to this order, and is incorporated herein by reference.
2. The Cost Allocation Manual submitted by Laclede Gas Company is approved.
3. Laclede Gas Company is granted a variance from the provisions of Commission Rules 4 CSR 240-40.015 and 4 CSR 240-40.016, as described in the stipulation and agreement.

¹ 4 CSR 240-40.015(10) and 4 CSR 240-40.016(11).

4. Laclede Gas Company shall issue the tariff sheet set forth as Appendix 3 to the stipulation and agreement.

5. Once all issues have been resolved in Laclede Gas Company's pending ACA cases, Staff shall file an updated recommendation regarding ending balances for each such case.

6. This order shall become effective on August 24, 2013.

R. Kenney, Chm., Jarrett, Stoll, and
W. Kenney, CC., concur.

Woodruff, Chief Regulatory Law Judge

NOTE: A Notice of Correction has been filed and is available in the official case files of the Public Service Commission.

NOTE: The Stipulation and Agreement in this case has not been published. If needed, this document is available in the official case files of the Public Service Commission.

In the Matter of the Joint Application of Missouri- American Water Company and Tri States Utility, Inc. for Authority for Missouri-American Water Company to Acquire Certain Assets of Tri States Utility, Inc. and in Connection Therewith, Certain Other Related Transactions

File No. WO-2013-0517

EVIDENCE, PRACTICE AND PROCEDURE

§23. Notice and hearing

WATER

§2. Certificate of convenience and necessity

The Commission approved the acquisition of one water company by another, issued a certificate of convenience and necessity to the buyer for service in the seller's former territory, and waived the pre-application notice.

**ORDER APPROVING TRANSFER OF ASSETS, GRANTING
CERTIFICATE OF CONVENIENCE AND NECESSITY, AND
GRANTING WAIVER**

Issue Date: August 21, 2013

Effective Date: August 29, 2013

On June 12, 2013, Missouri-American Water Company ("MAWC") and Tri States Utility, Inc. ("Tri States") filed a joint application with the Missouri Public Service Commission ("Commission") seeking authority for Tri States to sell substantially all its assets to MAWC. MAWC is a regulated water and sewer company providing water sewer service to approximately 454,000 customers and sewer service to approximately 4,000 customers in numerous cities and counties within Missouri. Tri States is a regulated water company holding a certificate of convenience and necessity from the Commission, authorizing it to provide water service to approximately 3,472 customers in Taney County, Missouri.

The Commission issued notice and set a deadline for intervention requests. Great Southern Bank applied for and was granted intervention. Great Southern Bank is the primary creditor of Tri States in a bankruptcy proceeding in the U.S. Bankruptcy Court for the District of Kansas. On July 15, 2013, that Court approved the transfer of Tri States' assets to MAWC, subject to approval by the Commission.

On August 5, 2013, the Commission's Staff filed its recommendation and memorandum to approve the transfer of assets and to grant MAWC a certificate of convenience and necessity, subject to certain conditions. Staff amended its recommendation and memorandum on August 12, 2013 (the "Amended Recommendation"). No party opposed Staff's Amended Recommendation, and MAWC affirmatively agreed to the conditions. No party has requested an evidentiary hearing, and no law requires one.¹

¹ *State ex rel. Rex Deffenderfer Ent., Inc. v. Public Serv. Comm'n*, 776 S.W.2d 494, 496 (Mo. App.W.D. 1989).

Therefore, this action is not a contested case ² and the Commission need not separately state its findings of fact.

The Commission has jurisdiction to approve a transfer of assets because “[n]o . . . water corporation or sewer corporation shall hereafter sell . . . its . . . works or system . . . without having first secured from the commission an order authorizing it so to do”.³ The Commission will only deny the application if approval would be detrimental to the public interest.⁴ The parties agree that the public interest will suffer no detriment from the sale under the conditions set forth in the Staff’s Amended Recommendation.

The Commission may grant a water or sewer corporation a certificate of convenience and necessity to operate after determining that the construction and operation are either “necessary or convenient for the public service.”⁵ The Commission articulated the specific criteria to be used when evaluating applications for utility CCNs in the case *In Re Intercon Gas, Inc.*, 30 Mo P.S.C. (N.S.) 554, 561 (1991). The *Intercon* case combined the standards used in several similar certificate cases, and set forth the following criteria: (1) there must be a need for the service; (2) the applicant must be qualified to provide the proposed service; (3) the applicant must have the financial ability to provide the service; (4) the applicant’s proposal must be economically feasible; and (5) the service must promote the public interest.⁶ Staff states in its Amended Recommendation that MAWC possesses adequate technical, managerial, and financial capacity to operate the water system currently certificated for Tri States and advises the Commission to approve the sale and transfer of water utility assets. Additionally, MAWC and Tri States are current on the submission of their annual assessments and annual reports. There are also no current violations or issues with the Department of Natural Resources that need immediate correction, and there are no deficiencies with respect to the water system.

Based on the verified filings, the Commission independently finds and concludes that the sale and transfer of assets will cause no detriment to the public interest, if the sale and transfer occur under the conditions in Staff’s Amended Recommendation. Subject to such conditions, therefore, the Commission will approve the application and incorporate the Amended Recommendation’s terms into this order. The Commission also concludes that the factors for granting a certificate of convenience and necessity to MAWC have been satisfied and that it is in the public interest for MAWC to provide water service to the customers currently being served by Tri States. Consequently, based on the Commission’s certificate of convenience and necessity, the Commission will make this order effective on less than thirty days’ notice in order to accommodate the scheduled closing of the sale and transfer of assets transaction.

² Section 536.010(4), RSMo Supp. 2012.

³ Section 393.190.1, RSMo 2000.

⁴ *State ex rel. City of St. Louis v. Public Service Comm’n of Missouri*, 73 S.W.2d 393, 400 (Mo. 1934).

⁵ Section 393.170.3, RSMo 2000.

⁶ The factors have also been referred to as the “Tartan Factors” or the “Tartan Energy Criteria.” See Report and Order, *In re Application of Tartan Energy Company, L.C., d/b/a Southern Missouri Gas Company, for a Certificate of Convenience and Necessity*, Case No. GA-94-127, 3 Mo. P.S.C. 3d 173 (September 16, 1994), 1994 WL 762882, *3 (Mo. P.S.C.).

The application also asked the Commission to waive the 60-day notice requirement under 4 CSR 240-4.020(2), if necessary. The applicants explain that such waiver may not be necessary since matters of this type rarely become contested cases. However, the applicants assert that good cause exists in this case for granting such waiver because the application was filed as soon as possible considering that it involves an asset purchase negotiation during bankruptcy proceedings. In addition, the applicants state that no purpose would be served to require the applicants to wait sixty days after their agreement to file the application with the Commission. The Commission finds that good cause exists to waive the notice requirement and a waiver of 4 CSR 240-4.020(2) will be granted.

THE COMMISSION ORDERS THAT:

1. A waiver of the notice requirement under Commission Rule 4 CSR 240-4.020(2) is granted.
2. The joint application for the sale and transfer of assets filed by Missouri-American Water Company and Tri States Utility, Inc. is approved, subject to the following conditions:
 - a) Missouri-American Water Company shall notify Staff within five days after completion of the transfer of utility assets. If the transfer does not occur within thirty days of the effective date of this order, then Missouri-American Water Company or Tri States Utility, Inc. shall submit a progress report explaining the delay within that thirty day period and each thirty days thereafter until the transfer is complete.
 - b) Missouri-American Water Company shall adopt the tariffs for water service that are currently on file and approved for Tri States Utility, Inc. Missouri-American Water Company shall file, within five days after closing of the transfer of assets, an adoption notice tariff sheet and revised title page and index sheets, as a 30-day filing, adopting the existing Tri States Utility, Inc. tariff.
 - c) Missouri-American Water Company is authorized, upon closing of the transfer, to provide water service under the existing tariffs of Tri States Utility, Inc. on an interim basis until the effective date of the new tariff sheets.
 - d) Tri States Utility, Inc. shall transfer to Missouri-American Water Company all of its books and records including, but not limited to, purchase orders, invoices, contracts and agreements relating to the Tri States Utility, Inc. operations, drawings and blue prints of the water system, plant records, operations records, expense records and all customer billing records upon the closing of the transfer of assets.
 - e) Missouri-American Water Company shall maintain utility plant records and all customer account records as acquired from Tri States Utility, Inc., and shall keep all books and records, including plant property records, in accordance with the Uniform System of Accounts as described in Staff's Amended Recommendation.

- f) Missouri-American Water Company shall adopt the plant-in-service and depreciation reserve, as calculated by the Commission's Audit Staff valued as of June 30, 2013, for purposes of studying expected rate base for plant-in-service and depreciation reserve to be included within the books and records of Missouri-American Water Company with respect to the Tri States Utility, Inc. system.
- g) Missouri-American Water Company shall maintain and retain proper plant in service, depreciation reserve, cost of removal, salvage, and CIAC records on a going forward basis.
- h) Missouri-American Water Company shall not recover any acquisition adjustment or acquisition premium in relation to this action or any future rate case.
- i) Missouri-American Water Company shall use the schedule of depreciation rates set out in Attachment A to Staff's Amended Recommendation, from the date of the transfer of assets forward, unless changed by any future order of the Commission.
- j) Missouri-American Water Company shall distribute to former Tri States Utility, Inc. customers an informational brochure detailing the rights and responsibilities of the utility and its customers, which shall adhere to the provisions of Commission Rule 4 CSR 240-13.040(3).
- k) Missouri-American Water Company shall include the former Tri States Utility, Inc. customers in its regular reporting to the Commission's Engineering and Management Services Unit regarding customer call data, meter reading data, and CSC information, as further described in the Staff Amended Recommendation.
- l) Missouri-American Water Company shall provide adequate training to all customer service representatives prior to the former Tri States Utility, Inc. customers receiving their first bill from Missouri-American Water Company.
- m) Missouri-American Water Company shall provide to the Commission's Engineering and Management Services Unit within thirty days of this order a completed "transition schedule" for the actions necessary to successfully transition former customers of Tri States Utility, Inc. into the Missouri-American Water Company customer information system and implementation dates for when bills will begin to be issued to Tri States Utility, Inc. customers by Missouri- American Water Company.
- n) Missouri-American Water Company shall provide to the Commission's Engineering and Management Services Unit a sample of five percent of its first month bills issued to former Tri States Utility, Inc. customers, in order to check for accuracy.

3. Tri States Utility, Inc. is authorized to sell and Missouri-American Water Company is authorized to acquire the assets identified in the joint application.

4. On the effective date of Missouri-American Water Company's new adoption notice tariff sheets and revised title page and index sheets, Missouri-American Water Company is granted a Certificate of Convenience and Necessity for the provision of water service for Tri States Utility, Inc.'s service areas described in the transfer of assets application.

5. Missouri-American Water Company and Tri States Utility, Inc. are authorized to enter into, execute and perform and to take any and all other actions which may be reasonably necessary and incidental to the performance of the acquisition.

6. Nothing in this order constitutes a finding that would preclude the Commission from considering the ratemaking treatment to be afforded any matters, including future expenditures by Missouri-American Water Company, in any later proceeding.

7. This order shall become effective on August 29, 2013.

R. Kenney, Chm., Jarrett, Stoll,
and W. Kenney, CC., concur.

Bushmann, Regulatory Law Judge

In the Matter of the Petition for an Interim Receiver and for an Order Directing the General Counsel to Petition the Circuit Court for the Appointment of a Receiver for M.P.B., Inc. and P.C.B., Inc.

Case No. SO-2014-0052

SEWER

§24. Abandonment or discontinuance

On a finding that owners of sewer companies had abandoned their sewer systems, the Commission granted Staff's petition to appoint an interim receiver, and file an action in circuit court for appointment of a receiver, for two sewer companies.

**ORDER APPOINTING INTERIM RECEIVER AND
ORDER AUTHORIZING CIRCUIT COURT ACTION**

Issue Date: August 28, 2013

Effective Date: September 7, 2013

On August 23, 2013, the Staff of the Commission filed the above-styled petition. Staff claims that M.P.B, Inc., and P.C.B., Inc. (hereafter "the Companies") have effectively abandoned their sewer systems. Therefore, Staff asks for expedited treatment of its petition for an order appointing an interim receiver and directing the Commission's General Counsel to petition the Circuit Court for the appointment of a receiver.

Included with Staff's petition is a letter from the Companies' owners. The letter states that the owners can no longer operate the Companies with their time and economic resources.

Also included with the petition is an Agreement signed by Staff, the Office of the Public Counsel ("OPC"), Johansen Consulting Services, LLC ("JCS"), and the Missouri Department of Natural Resources ("DNR"). That agreement states that Staff will ask the Commission to appoint JCS as interim receiver, and will request the Commission to allow its General Counsel to ask the circuit court to appoint JCS as receiver for the Companies.

JCS further agrees to file rate cases one working day after the effective date of the Commission order appointing it as interim receiver. That rate increase request will include a request for emergency rates. Staff agrees to organize a public meeting and discuss the rate increases and other concerns with the Companies' ratepayers.

The Commission is authorized to petition the circuit court for an order of receivership against a sewer corporation that regularly provides service to eight thousand or fewer customers upon finding the utility is unable or unwilling to provide safe and adequate service, or has been actually or effectively abandoned by its owners.¹ The Commission may also appoint an interim receiver to serve until the circuit court appoints a receiver.²

¹ Section 393.145.1 RSMo (2012).

² Section 393.145.2 RSMo (2012).

Those statutes state that the Commission shall hold a hearing before such determinations. However, such a hearing is not required if no party objects to the petition, and requests a hearing.³

Based upon the Companies' owners informing Staff that they are unable to operate the Companies, and the agreement among the other parties, the Commission finds no party objects to the petition and, thus, no hearing is required. Further, based upon the petition and exhibits, the Commission determines that the Companies regularly provide service to eight thousand or fewer customer connections, the Companies are unable or unwilling to provide safe and adequate service, and the Companies have been actually or effectively abandoned by their owners. Thus, the Commission will appoint JCS as interim receiver for the Companies, and will authorize its General Counsel to petition the circuit court for appointment of a receiver for the Companies.

The Commission further notes that its orders are effective in thirty days, except as otherwise provided.⁴ The Commission finds exigent circumstances exist that could endanger the health, safety, and welfare of the Companies' ratepayers unless the Commission acts expeditiously. Thus, the Commission will make its order effective in ten days.

THE COMMISSION ORDERS THAT:

1. Johansen Consulting Services, LLC is appointed interim receiver for M.P.B., Inc., and P.C.B., Inc.
2. The General Counsel of the Commission is authorized and ordered to file a petition for the appointment of a receiver in circuit court against M.P.B., Inc., and P.C.B., Inc.
3. The Data Center will send a copy of this order to the registered agent of M.P.B., Inc., and P.C.B., Inc., Nicole Pfeffer, 505 Brick Church Road, Labadie, MO 63055.
4. This order shall become effective on September 7, 2013.
5. This case shall close on September 8, 2013.

R. Kenney, Chm., Jarrett, Stoll, and
W. Kenney, CC., concur.

Pridgin, Senior Regulatory Law Judge

NOTE: Judgment Appointing Receiver issued by Circuit Court of Cole County on March 3, 2014, Case No. 14AC-CC00020.

³ *State ex rel. Rex Deffenderfer Ent., Inc. v. Public Serv. Com'n*, 776 S.W.2d 494 (Mo. App. 1989).

⁴ Section 386.490.3 RSMo (2012).

In the Matter of the Request for an Increase in Sewer Operating Revenues of Emerald Pointe Utility Company**File No. SR-2013-0016 et. al,****ACCOUNTING****§16. Deposits by patrons**

Public utility's failure to comply with tariff provisions governing customer deposits was cause to require a refund of those deposits to customers.

RATES**§102. Installation, connection and disconnection charges**

The Commission required a refund of over-collected late charges and re-connection charges, but did not require payment of interest because no applicable law provided for the payment of interest.

§66. Filing of schedules reports and records

Public utility filed one tariff, which included a commodity charge. But the Commission's staff presented a different tariff to the Commission for approval, which did not have a commodity charge. The latter tariff was not lawfully before the Commission, so the public utility did not violate any approved tariff when it collected the commodity charge.

EXPENSES**§6. Accounting**

The past failure to record properly an amount collected lawfully did not support denial of the amount in ratemaking.

SECURITY ISSUES**§61. Proportions of stock, bonds and other security**

The Commission approved one capital structure for one corporation providing two services and rejected the proposed alternative of two capital structures, one for each of the two services.

EXPENSE**§51. Legal expense****Valuation****§39. Legal expense**

Public utility's lawyers did not duplicate each other's efforts, so the Commission awarded the expenses of both lawyers in rate-making.

§77. Adjustments to test year levels**§24. Test year and true up**

In determining the amount of an expense to include in rate-making, the Commission rejected evidence of an amount outside the test year.

REVISED REPORT AND ORDER**Issue Date: September 24, 2013****Effective Date: October 24, 2013****APPEARANCES**

Dean Cooper, Attorney at Law, Brydon, Swearngen & England, P.C., 312 E. Capital Ave., Jefferson City, Missouri 65102. And

Vincent F. O'Flaherty, Attorney at Law, Law Offices of Vincent F. O'Flaherty, 2 Cleaver II Blvd., Suite 445, Kansas City, Missouri 64112
For Emerald Pointe Utility Company.

Kevin Thompson, Chief Staff Counsel, and **Amy Moore**, Legal Counsel, P.O. Box 360, 200 Madison Street, Jefferson City, Missouri 65102
For the Staff of the Missouri Public Service Commission.

Christina Baker, Legal Counsel, P.O. Box 2230, 200 Madison Street, Suite 650, Jefferson City, Missouri 65102
For the Office of the Public Counsel and the Public.

CHIEF REGULATORY LAW JUDGE: Morris L. Woodruff

The Missouri Public Service Commission, having considered all the competent and substantial evidence upon the whole record, makes the following findings of fact and conclusions of law. The positions and arguments of all of the parties have been considered by the Commission in making this decision. Failure to specifically address a piece of evidence, position, or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision.

Summary

This revised report and order authorizes the company to file a tariff sufficient to recover revenues as determined by the Commission in this order as a resolution to the rate increase request initiated by Emerald Pointe pursuant to the Commission's Small Utility Rate Making Process.

This revised report and order also concludes that the complaining parties have failed to meet their burden of proving that Emerald Pointe has overcharged its customers by collecting a sewer commodity charge of \$3.50 per 1,000 gallons.

Procedural History

On July 16, 2012, Emerald Pointe Utility Company, Inc., sent a letter to the Commission requesting an increase of \$186,000 in its annual sewer system operating revenues and an increase of \$13,000 in its annual water system operating revenues. By filing the letter, Emerald Pointe instituted a proceeding under the Commission's Small Utility Rate Case Procedure, which is set forth at 4 CSR 240-3.050. The Commission designated the sewer rate increase request as File No. SR-2013-0016 and the water rate increase as File No. WR-2013-0017.

As provided in the Commission's regulation, the Commission's Staff and the Office of the Public Counsel undertook an investigation and audit of Emerald Pointe's water and sewer operations. On March 14, 2013¹, Staff and Emerald Pointe filed a partial disposition agreement that purported to resolve the issues between them. However, Staff and Emerald Pointe were unable to resolve all issues and asked the Commission to resolve all of the remaining issues through contested case procedures. Subsequently, on March 18, Public Counsel objected to certain aspects of the disposition agreement and requested that an evidentiary hearing be held on all issues.

On March 19, the Commission consolidated the water case, WR-2013-0017, into the sewer case, SR-2013-0016. Thereafter, all proceedings occurred in the consolidated case, which is designated as SR-2013-0016.

¹ All dates refer to 2013 unless otherwise noted.

On April 17, the Commission conducted a local public hearing in Branson, Missouri, near Emerald Pointe's service area. At that hearing, the Commission heard comments from Emerald Pointe's customers and the public regarding the company's request for a rate increase. Comments were also received regarding alleged unauthorized charges by Emerald Pointe.²

In compliance with the established procedural schedule, the parties prefiled direct, rebuttal, and surrebuttal testimony. An evidentiary hearing was held on May 9. The parties filed post-hearing briefs on June 6. At no time, before, during or after the hearing did any party request additional time in which to present additional evidence or witnesses, on any issue.

The Commission issued a report and order in this case on July 10. That report and order became effective on July 30. Public Counsel filed a timely application for rehearing on July 26. In response to that application for rehearing, the Commission determined that the portion of the report and order dealing with overcharge refund issues should be revised. For that purpose, the Commission has withdrawn the July 10 report and order and is issuing this revised report and order in its stead.

The Unanimous Stipulation and Agreement Regarding Rate Design Methodology

On April 22, before the evidentiary hearing, Emerald Pointe, Staff, and Public Counsel filed a unanimous stipulation and agreement regarding rate design methodology. After considering the stipulation and agreement, the Commission approved it as a resolution of the issues addressed in that agreement. The issues resolved in the stipulation and agreement will not be further addressed in this report and order, except as they may relate to any unresolved issues.

Conclusions of Law Regarding Jurisdiction

A. Emerald Pointe is a public utility as defined in Section 386.020(43), RSMo (Supp. 2012). It is also a sewer corporation as defined in Section 386.020(49), RSMo (Supp. 2012) and a water corporation as defined in Section 386.020(59), RSMo (Supp. 2012). As such, Emerald Pointe is subject to the Commission's jurisdiction pursuant to Chapters 386 and 393, RSMo 2000.

B. Section 393.140(11), RSMo 2000, gives the Commission authority to regulate the rates Emerald Pointe may charge its customers for water and sewer service.

Conclusions of Law Regarding the Determination of Just and Reasonable Rates

A. In determining the rates Emerald Pointe may charge its customers, the Commission is required to determine that the rates are just and reasonable.³ Emerald Pointe has the burden of proving its proposed rates are just and reasonable.⁴

² Transcript, Pages 96-97.

³ Section 393.150.2, RSMo 2000.

⁴ Section 393.150.2, RSMo 2000.

B. In determining whether the rates proposed by Emerald Pointe are just and reasonable, the Commission must balance the interests of the investor and the consumer.⁵ In discussing the need for a regulatory body to institute just and reasonable rates, the United States Supreme Court has held:

Rates which are not sufficient to yield a reasonable return on the value of the property used at the time it is being used to render the services are unjust, unreasonable and confiscatory, and their enforcement deprives the public utility company of its property in violation of the Fourteenth Amendment.⁶

In the same case, the Supreme Court provided the following guidance on what is a just and reasonable rate:

What annual rate will constitute just compensation depends upon many circumstances and must be determined by the exercise of a fair and enlightened judgment, having regard to all relevant facts. A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures. The return should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties. A rate of return may be reasonable at one time and become too high or too low by changes affecting opportunities for investment, the money market and business conditions generally.⁷

The Supreme Court has further indicated:

‘[R]egulation does not insure that the business shall produce net revenues.’ But such considerations aside, the investor interest has a legitimate concern with the financial integrity of the company whose rates are being regulated. From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on the debt and dividends on the stock. By that standard the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital.⁸

⁵ *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 603, (1944).

⁶ *Bluefield Water Works & Improvement Co. v. Public Service Commission of the State of West Virginia*, 262 U.S. 679, 690 (1923).

⁷ *Bluefield*, at 692-93.

⁸ *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944) (citations omitted).

C. In undertaking the balancing required by the Constitution, the Commission is not bound to apply any particular formula or combination of formulas. Instead, the Supreme Court has said:

Agencies to whom this legislative power has been delegated are free, within the ambit of their statutory authority, to make the pragmatic adjustments which may be called for by particular circumstances.⁹

D. Furthermore, in quoting the United States Supreme Court in *Hope Natural Gas*, the Missouri Court of Appeals said:

[T]he Commission [is] not bound to the use of any single formula or combination of formulae in determining rates. Its rate-making function, moreover, involves the making of 'pragmatic adjustments.' ... Under the statutory standard of 'just and reasonable' it is the result reached, not the method employed which is controlling. It is not theory but the impact of the rate order which counts.¹⁰

Conclusions of Law Regarding the Small Utility Rate Making Process

A. This small company rate increase case under the provisions of Commission rule 4 CSR 240-3.050 was initiated by Emerald Pointe. Staff and Emerald Pointe filed a partial agreement on March 14, but indicated they were unable to resolve the remaining issues and requested that those issues be resolved through contested case procedures. Public Counsel identified additional issues upon which it did not agree and also requested resolution through a contested case procedure. Unlike in a large company rate case, Emerald Pointe was not required to file a tariff, to initiate the process. Therefore no operation of law date and no tariff for the Commission to approve, reject, or suspend existed at the time the Commission issued its July 10 report and order. Subsequently, Emerald Pointe filed a tariff to comply with the Commission's July 10 report and order. The Commission took no action regarding that tariff and it went into effect by its terms on August 23.

B. Commission Rule 4 CSR 240-3.050(21) allows the company or Staff to request resolution of unresolved issues through contested case procedures. Both Staff and Emerald Pointe made such a request in this case, as did Public Counsel. The Commission rule for Small Utility Rate Making does give the parties the opportunity to proceed on all issues in one proceeding, which by full agreement of all parties to the matter is what occurred here. All parties were given every opportunity to fully and completely present all of their issues to the Commission. Since all the parties agreed to present the issues to the Commission in this manner, it is appropriate to issue a report and order that resolves the identified issues and directs Emerald Pointe to file a tariff consistent with the Commission's decisions.

⁹ *Federal Power Commission v. Natural Gas Pipeline Co.* 315 U.S. 575, 586 (1942).

¹⁰ *State ex rel. Associated Natural Gas Co. v. Pub. Serv. Comm'n*, 706 S.W.2d 870, 873 (Mo. App. W.D. 1985).

RATE CASE ISSUES

The first group of issues concern questions about the company's cost of service and the rates it should be allowed to charge its customers on a going forward basis. These are the issues that affect the tariffs that Emerald Pointe has filed to comply with the July 10 report and order. The resolution of the rate case issues is not changed by this revised report and order.

1. Hollister Sewage Treatment Expense:

- a. What amount of expense related to the sewage treatment performed by the City of Hollister should be recovered in rates?**

Findings of Fact:

1. Because of recent improvements to its system, Emerald Pointe pumps its sewage to the nearby City of Hollister for treatment. The company now must pay Hollister to treat its sewage. Based on information provided by the company, Staff allowed \$75,939 in rates to cover that expense.¹¹

2. The cost to cover that expense was based on an estimation of the volume of sewage used in the design of the sewer commodity charge as originally proposed by the company. However, the first bill Emerald Pointe received from the City of Hollister for wholesale sewage treatment expense in January 2013 was larger than the company had anticipated. For that reason, Emerald Pointe proposes the ongoing amount allowed for this expense be increased by \$15,188, based upon a 20 percent increase in the volume used to calculate it.¹²

3. The January 2013 bill is the first bill Emerald Pointe received from the City of Hollister and could be a one-month anomaly. When more billing history is obtained, the monthly average expense may still fall within the amount previously anticipated by the company and Staff.¹³

4. The January 2013 bill falls outside the test year used to calculate rates for this case.¹⁴

5. Emerald Pointe may request another rate increase to address changes in costs outside the current test year if future bills from the City of Hollister are indeed larger than anticipated.¹⁵

Conclusions of Law:

A. This is a rate case issue. As such, Emerald Pointe has the burden of proving its proposed rates are just and reasonable.¹⁶

¹¹ Hanneken Direct, Ex. 25, Page 2, Lines 4-17.

¹² Johansen Rebuttal, Ex. 16, Page 3, Lines 10-22.

¹³ Transcript, Pages 249-250, Lines 17-25, 1-15.

¹⁴ Busch Surrebuttal, Ex. 2, Page 2, Line 15.

¹⁵ Busch Surrebuttal, Ex. 2, Page 2, Lines 15-17.

¹⁶ Section 393.150.2, RSMo 2000.

Decision:

The otherwise agreed upon level of anticipated expense used to calculate Emerald Pointe's on-going rates shall not be recalculated based on a single month of expense outside the test year used to calculate rates.

2. Legal Fees:**a. What amount of the company's legal fees should be recovered in rates?****Findings of Fact:**

1. Emerald Pointe recently incurred legal fees in connection with two cases before the Commission. File No. SA-2012-0362 was a certificate case in which the company sought authority from the Commission to construct, own, and operate a sewage pipeline to pump waste to the City of Hollister for treatment. File No. SF-2013-0346 was the financing case in which Emerald Pointe sought authority to borrow money to construct the sewage pipeline.

2. Staff's updated accounting schedules include \$386 for legal expenses in the annual cost of service for both water and sewer services.¹⁷ That is a combined annual total of \$772.

3. The annual legal expense amount was obtained by normalizing Emerald Pointe's legal expenses over five years.¹⁸

4. The legal expense amount is distinct from the rate case expense amount that is addressed in the next issue.

5. All parties now accept the legal expense amount utilized by Staff.¹⁹

Conclusions of Law:

A. This is a rate case issue. As such, Emerald Pointe has the burden of proving its proposed rates are just and reasonable.²⁰

Decision:

All parties agree \$772 in legal fees should be included in the company's annual revenue requirement. The Commission finds that amount to be reasonable. A total of \$772 in legal fees shall be included in the company's annual revenue requirement.

3. Rate Case Expense:**a. What amount of the company's legal fees should be recovered in rates?**

¹⁷ Exhibits 9 and 10.

¹⁸ Rose Surrebuttal, Ex. 8, Page 10, Lines 4-11.

¹⁹ Transcript, Pages 254-255, Lines 23-25, 1-6.

²⁰ Section 393.150.2, RSMo 2000.

Findings of Fact:

1. Staff proposed to include annualized expenses of \$3,141 in Emerald Pointe's cost of service to cover the company's cost of pursuing this rate case. However, that amount includes rate case expenses only through March 2013.²¹

2. Many of the company's rate case expenses were not incurred until the hearing and will continue to accumulate even after the Commission issues its report and order.²²

3. It is appropriate to update rate case expenses through a date closer to when new rates will go into effect.²³ However, no party specified a date to which rate case expenses should be updated.

4. At the hearing, Emerald Pointe used the services of two attorneys. Mr. Cooper handled the rate case issues while Mr. O'Flaherty handled the sewer commodity charge issue.

5. In its brief, Public Counsel challenges the necessity of Emerald Pointe's use of a second attorney, Mr. O'Flaherty, to present its case at the hearing. Public Counsel asserts that O'Flaherty's activities were completely duplicative of those of Cooper and that there was nothing done by O'Flaherty that could not have been done by Cooper.²⁴

6. Since this argument was not raised by Public Counsel until its brief, no other party has had an opportunity to respond.

Conclusions of Law:

A. This is a rate case issue. As such, Emerald Pointe has the burden of proving its proposed rates are just and reasonable.²⁵

Decision:

The Commission agrees that it is appropriate for Emerald Pointe to be allowed to update its rate case expenses to some point near the end of this case. Doing so will allow the company to recover its reasonably incurred expenses of presenting this case to the Commission. No party specified a cut-off date for consideration of rate case expense, so the Commission will specify June 15, 2013 as the cut-off date.

Public Counsel challenged the reasonableness and necessity of Emerald Pointe's use of two attorneys to present its case to the Commission. Since this argument was not raised until after the evidentiary hearing, there is no evidence for the Commission to consider. As a result, the Commission must decide this matter based on its own observation of the conduct of the attorneys at the hearing.

²¹ Rose Surrebuttal, Ex. 8, Page 9, Lines 8-20.

²² Transcript, Page 256, Lines 7-10.

²³ Transcript, Pages 260-261, Lines 24-25, 1-4.

²⁴ Public Counsel's Brief, Page 15.

²⁵ Section 393.150.2, RSMo 2000.

Both Mr. Cooper and Mr. O'Flaherty represented their client in a competent and professional matter. Contrary to Public Counsel's assertion, their efforts were not duplicative. Mr. O'Flaherty took the lead on the issue regarding a possible refund of \$500,000 in alleged overcharges and interest relating to the company's collection of a sewer commodity charge. Obviously, that was a substantial issue with possible profound impact on the future of the company. Emerald Pointe's decision to hire a second attorney to deal with that issue was not inappropriate; particularly given the company's experience in its 2000 rate case when it, in accordance with Commission rules, did not engage the services of a lawyer. Emerald Pointe may recover costs incurred to hire Mr. O'Flaherty along with its other reasonably incurred rate case expense.

4. Capital Structure:

a. Should the capital structure of the company for ratemaking purposes be:

- 1) A structure that treats the company as one entity; or**
- 2) A structure that considers the water and sewer operations of the company separately?**

Findings of Fact:

1. Emerald Pointe is a single corporate entity that offers both water and sewer service.²⁶

2. Emerald Pointe has recently incurred substantial debt to provide sewer service to its customers. Specifically, it borrowed \$1,000,000 from Hawthorn Bank to finance the construction of a sewage pipeline to transport waste to the City of Hollister for treatment. In addition, it borrowed \$66,860 from White River Valley Electric Cooperative in connection with that same project.²⁷

3. Emerald Pointe currently has no debt connected with its water operations.²⁸

4. Emerald Pointe's financing and credit abilities are based on Emerald Pointe's cash flows and revenues as a whole, including both water and sewer operations.²⁹

5. All of Emerald Pointe's assets - those that are used to provide water service, and those that are used to provide sewer service - are pledged to support the current debt.³⁰

6. Because Emerald Pointe is a single corporate entity, there are no restrictions on the use of sewer-generated cash flows to support water operations and vice-versa.³¹

7. Emerald Pointe has 364 sewer customers and 389 water customers, so some water customers are not also sewer customers.³²

²⁶ Marevangepo Surrebuttall, Ex. 22, Page 5, Lines 18-19.

²⁷ Marevangepo Surrebuttall, Ex. 22, Page 3, Lines 4-8.

²⁸ Transcript, Page 268, Lines 12-19.

²⁹ Marevangepo Surrebuttall, Ex. 22, Page 6, Lines 21-24.

³⁰ Transcript, Page 278, Lines 19-25.

³¹ Marevangepo Surrebuttall, Ex. 22, Page 7, Lines 8-14.

³² Russo Direct, Schedules JMR 2 and JMR 3.

8. Staff, supported by Emerald Pointe, would use a single actual capital structure for Emerald Pointe when determining the company's rate of return. That capital structure would include 70.21 percent debt and 29.79 percent equity.³³

9. Public Counsel would utilize a separate capital structure for sewer and water operations, reasoning that water customers should not subsidize sewer customers. Public Counsel's capital structure for sewer operations would be 19.77 percent equity and 80.23 percent debt. For water operations, that structure would be 100 percent equity and 0 percent debt.³⁴

Conclusions of Law:

A. This is a rate case issue. As such, Emerald Pointe has the burden of proving its proposed rates are just and reasonable.³⁵

Decision:

Emerald Pointe is a single corporate entity that provides both water and sewer service. As a single entity it has borrowed money to finance a pipeline used to provide sewer service. However, that debt is the debt of the single corporate entity, not the debt of a hypothetical separate sewer service providing entity. All of Emerald Pointe's water and sewer revenues support that single corporate entity and all of that company's debt has been incurred by that single corporate entity. Therefore, it is appropriate to utilize a single actual capital structure when determining the company's rate of return. The actual capital structure including 70.21 percent debt and 29.79 percent equity calculated by Staff is appropriate.

5. Rate of Return / Return on Equity:

- a. What is the appropriate cost of equity for the company?
- b. What is the appropriate methodology for estimating small water and sewer companies' rates of return?

Findings of Fact:

1. Return on equity (ROE) is an attempt to estimate the return an investor should be allowed to earn on his or her investment in the company. Staff used an ROE of 13.26% in determining Emerald Pointe's allowed rate of return.³⁶

2. Staff arrived at its ROE recommendation by adding a four percent risk premium to a three-month average yield on B+ rated 30-year public utility bonds.³⁷ The use of B+ rated bonds is consistent with Staff's estimate of the credit quality of the company.³⁸

3. Public Counsel takes the same four percent risk premium used by Staff and adds it to what it contends is Emerald Pointe's actual cost of debt to arrive at a recommended ROE of 9.35 percent.³⁹

³³ Marevangeo Surrebuttal, Ex. 22, Page 7, Lines 19-22 and Transcript, Page 266.

³⁴ Robertson Rebuttal, Ex. 23, Page 19, Lines 1-6.

³⁵ Section 393.150.2, RSMo 2000.

³⁶ Marevangeo Surrebuttal, Ex. 22, Page 17, Line 9.

³⁷ Marevangeo Surrebuttal, Ex. 22, Page 11, Lines 19-21.

³⁸ Marevangeo Surrebuttal, Ex. 22, Page 14, Lines 16-22.

³⁹ Robertson Rebuttal, Ex. 23, Page 21, Lines 13-18.

4. Emerald Pointe supports the ROE recommended by Staff and did not offer its own ROE recommendation.

5. Public Counsel's ROE recommendation has a surface appeal because it purports to be based on Emerald Pointe's actual cost of debt. However, the cost of debt Public Counsel uses is not a fair measure of the actual ability of Emerald Pointe to obtain debt financing.⁴⁰

6. Emerald Pointe has recently obtained debt financing from two sources. The first, and largest was a \$1 million commercial bank loan for the purpose of constructing a sewer pipeline. That loan has a five year term, amortized over twenty years with a five year balloon payment. It carries a 5.5 percent interest rate. However, that loan is personally guaranteed by Emerald Pointe's owner, Gary Snadon, and his personal assets are used as collateral for the loan. Without Snadon's personal guarantee no bank would have been willing to make a \$1 million loan to Emerald Pointe under any circumstances.⁴¹

7. The second loan obtained by Emerald Pointe was a loan of \$66,000 at 3.15 percent interest. However, that loan was obtained from White River Valley Electric Cooperative for the purchase of electric generators from White River for use on the sewer pipeline. Again, that loan is not indicative of Emerald Pointe general ability to borrow money.⁴²

8. Compared to Public Counsel's use of the actual interest rates associated with the loans obtained by Emerald Pointe, Staff's attempt to use rates associated with public utility bonds is a reasonable means to determine an appropriate return on equity for Emerald Pointe.⁴³

Conclusions of Law:

A. This is a rate case issue. As such, Emerald Pointe has the burden of proving its proposed rates are just and reasonable.⁴⁴

B. A public utility, such as Emerald Pointe, is:
entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures.⁴⁵

⁴⁰ Murray Surrebuttal, Ex. 24, Page 5, Lines 9-16.

⁴¹ Menke Surrebuttal, Ex. 20, Pages 3-4, Lines 18-20, 1-22.

⁴² Menke Surrebuttal, Ex. 20, Page 3, Lines 12-15.

⁴³ Transcript, Page 306, Lines 2-5.

⁴⁴ Section 393.150.2, RSMo 2000.

⁴⁵ *Bluefield Water Works & Improvement Co. v. Public Service Commission of the State of West Virginia*, 262 U.S. 679, 692-93 (1923).

Decision:

The 13.26 percent return on equity proposed by Staff is a reasonable measure of the return required to compensate Emerald Pointe's owners for their investment in the company. In contrast, the 9.35 percent return on equity proposed by Public Counsel is not credible because it is more properly a measure of the return on equity associated with an investment in Emerald Pointe's owner since it is almost entirely based on the owner's ability to obtain a loan for the company through his personal guarantee and pledge of his personal property as collateral. The Commission accepts the 13.26 percent return on equity proposed by Staff.

6. CIAC Reserve – Customer Fees:**a. What is the appropriate amount of CIAC reserve to book for customer fees?****Findings of Fact:**

1. This issue arises because of incorrect accounting by Emerald Pointe before 2011. The company appropriately collected \$29,800 from its customers from a new water customer connection fee. For accounting purposes the connection fees should have been booked as contributions in aid of construction (CIAC), which is excluded from the company's rate base. At the same time, the actual costs of installing a connection, including labor expenses, should have been booked to Plant in Service, which is a rate base item. It is expected that the CIAC should balance against the Plant in Service, leaving no net changes in the company's rate base. However, Emerald Pointe booked only \$12,221 to Plant in Service, leaving \$17,579 unaccounted for on the company's books.⁴⁶

2. The money in question came from Emerald Pointe's collection of a \$400 fee for each new water customer collection. The fee is intended to cover materials and installation costs related to the new connection. For several years before 2011, Emerald Pointe only included the costs of meters or labor costs incurred to install meters in the plant accounts and not any of the other connection costs.⁴⁷

3. Staff testified that the company did not keep sufficient records to allow it to verify the actual costs of installation that should have been booked to Plant in Service. So rather than treating the \$17,579 as CIAC, Staff accounted for it as one-time miscellaneous revenues that were not included in the company's ongoing expenses for ratemaking purposes.⁴⁸

4. In contrast, Public Counsel would simply treat the \$17,579 as CIAC and thereby offset that amount of the company's rate base.⁴⁹

5. Emerald Pointe's customers did receive the benefit of the money they paid for the connection fee as materials and labor used to establish the connection. They should not again receive that benefit as a reduction to Emerald Pointe's rate base.⁵⁰

⁴⁶ Robertson Rebuttal, Ex. 23, Page 6, Lines 3-10.

⁴⁷ Hanneken Surrebuttal, Ex. 26, Page 4, Lines 8-16.

⁴⁸ Hanneken Surrebuttal, Ex. 26, Page 5, Lines 1-19.

⁴⁹ Robertson Rebuttal, Ex. 23, Pages 6-7, Lines 15-19, 1-3.

⁵⁰ Transcript, Page 325, Lines 6-14.

Conclusions of Law:

A. This is a rate case issue. As such, Emerald Pointe has the burden of proving its proposed rates are just and reasonable.⁵¹

Decision:

Staff's accounting approach is correct. Public Counsel's approach would inappropriately reduce Emerald Pointe's rate base for legitimate expenses that Emerald Pointe actually incurred but did not record in the proper account.

7. Plant Related Balance Update Period:**a. Through what period should the plant-related balance be updated?****Findings of Fact:**

1. Staff used February 28, 2013 as the end of the update period for this case. As of that date, Staff obtained all relevant plant-balance data related to the new pipeline project, as well as data related to other issues in the case.⁵²

2. Public Counsel argues the update should be taken to a date closer to the effective date of new rates to better measure the company's actual financial position by considering updated additions, retirements, depreciation, and other plant related balances.⁵³

3. Staff does not have the ability to review and update all other relevant factors in the rate case other than plant in service costs. Therefore, to review and update some factors without reviewing and updating all factors would violate the matching principle.⁵⁴

4. The matching principle is simply that rates should be based on a measurement of costs and revenues at a single point in time. Updating some costs or revenues at a different time than other costs and revenues risks throwing the measurements out of balance and creating a single-issue ratemaking problem. For example, updating only a falling cost in one area might miss a corresponding rising cost in another area, thereby showing a false picture of the company's overall level of costs.⁵⁵

5. Public Counsel points to Staff's willingness to update rate case expense to a date closer to the effective date of the rates as an indicating that the matching principle should not control the proposed update of plant-related balances.⁵⁶

⁵¹ Section 393.150.2, RSMo 2000.

⁵² Hanneken Surrebuttal, Ex. 26, Page 7, Lines 5-11.

⁵³ Robertson Rebuttal, Ex. 23, Page 8, Lines 13-18.

⁵⁴ Hanneken Surrebuttal, Ex. 26, Page 7, Lines 14-16.

⁵⁵ Hanneken Surrebuttal, Ex. 26, Page 7, Lines 17-23.

⁵⁶ Transcript, Pages 327-328, Lines 14-25, 1-22.

6. However, it is generally not a violation of the matching principle to update rate case expense to some date closer to the effective date of rates because of the nature of those expenses and because they are the result of the case itself.⁵⁷ Most rate case expenses are not incurred until late in the rate case process and failing to update those expenses would prevent the company from recovering legitimate costs of doing business as a regulated utility.

Conclusions of Law:

A. This is a rate case issue. As such, Emerald Pointe has the burden of proving its proposed rates are just and reasonable.⁵⁸

B. When setting utility rates, the Commission is obligated to consider all relevant factors.⁵⁹

Decision:

For purposes of setting rates in this case, Staff has updated Emerald Pointe's general revenues and expenses through February 28, 2013. In order to adhere to the matching principle and to avoid engaging in single-issue ratemaking, some date must be chosen at which costs and revenues will be measured. Staff has utilized a reasonable date and Public Counsel's proposal to update only certain costs after that date is rejected.

COMPLAINT ISSUES

These issues concern allegations that Emerald Pointe has overcharged its customers in the past. Thus, they are in the nature of a complaint that could have been brought as a separate action by the complaining parties. By agreement of the parties, the Commission heard evidence regarding the complaint along with evidence regarding the rate case issues, but, since these are complaint issues, the burden of proof is different, as will be explained in the Commission's conclusions of law.

8. Sewer Commodity Charge:

- a. Was the company authorized to collect a sewer commodity charge as a result of File No. SR-2000-595?**

⁵⁷ Transcript, Page 330, Lines 4-7.

⁵⁸ Section 393.150.2, RSMo 2000.

⁵⁹ *State ex rel. Utility Consumers' Council of Missouri, Inc. v. Pub. Serv. Com'n*, 585 S.W.2d 41 (Mo. 1979).

Findings of Fact:

1. Before filing for a rate increase in this case, Emerald Pointe last changed its sewer rates as a result of a small company rate increase proceeding before the Commission in File No. SR-2000-595.⁶⁰

2. Using the Commission's small utility rate case procedure as it existed at the time, Emerald Pointe initiated the rate case process by sending a letter from its President, Gary Snadon, to the Executive Secretary of the Commission on May 20, 1999, asking for a ten percent increase in its base rate and its commodity usage rate for both water and sewer service.⁶¹ At that time Emerald Pointe's tariff authorized it to collect a sewer commodity charge for sewer service in the amount of \$5.83 per 1,000 gallons.⁶²

3. Emerald Pointe was not represented by legal counsel during the 2000 rate case, nor did it engage the assistance of an outside consultant with rate expertise during the course of that case.⁶³ At the time, Staff encouraged small utilities to proceed with a small rate case without engaging the services of an attorney.⁶⁴

4. Upon receiving the rate increase request letter from Emerald Pointe, the Commission's Staff undertook an audit of the utility's books and records to evaluate the need for a rate increase.⁶⁵

5. On March 7, 2000, Randy Hubbs, assistant manager of the Commission's water and sewer department, sent a letter to Gary Snadon, President of Emerald Pointe, in which Hubbs enclosed a draft letter and proposed tariff describing a settlement of Emerald Pointe's request for water and sewer rate increases.⁶⁶

6. Consistent with the Commission's small company rate increase procedure as it existed at that time, the March 7, 2000 letter asked Mr. Snadon to sign a letter requesting a rate increase in the agreed upon amount and to return that letter, settlement agreements, and proposed water and sewer tariffs directly to Mr. Hubbs. The letter indicated Hubbs would have the Commission's representative sign the agreement and would then file the fully executed agreement and tariff sheets with the Commission.⁶⁷

⁶⁰ Snadon Rebuttal, Ex. 13, Page 4, Lines 3-7.

⁶¹ Snadon Rebuttal, Ex. 13, Page 4, Lines 9-14. A copy of the rate increase letter is attached to Snadon's rebuttal testimony as Schedule GWS-1.

⁶² Snadon Rebuttal, Ex. 13, Page 4, Lines 16-18.

⁶³ Snadon Rebuttal, Ex. 13, Page 5, Lines 1-8.

⁶⁴ Transcript, Page 172, Lines 2-16.

⁶⁵ Busch Surrebuttal, Ex. 2, Page 3, Lines 19-20.

⁶⁶ Snadon Rebuttal, Ex. 13, Page 5, Lines 17-23. A copy of the letter and associated material that Staff sent to Emerald Pointe are attached to Snadon's rebuttal testimony as Schedule GWS-3.

⁶⁷ Snadon Rebuttal, Ex. 13, Schedule GWS-3.

7. Included among the documents sent to Snadon by Hubbs were two Agreements Regarding Disposition of Small Company Rate Increase Request. One disposition agreement was for a water rate increase and the other was for a sewer rate increase. Those agreements indicated that Staff and Emerald Pointe had agreed the utility should receive a rate increase of \$2,500 in its total annual operating revenues for both its water and sewer services. However, the agreements did not specify the rate design by which the utility was to recover that increase from its customers.⁶⁸

8. The rate design by which Emerald Pointe was to collect its rates from customers was specified in the new proposed tariffs that were also enclosed with Hubbs' letter. Those new proposed tariffs were prepared by Hubbs and presented to the company along with the disposition agreements.⁶⁹

9. The new proposed tariff for water service and the new proposed tariff for sewer service that were sent to Emerald Pointe by Staff both contained provisions that allowed the utility to charge its customers a monthly customer charge, plus a sewer commodity charge of \$3.50 per 1,000 gallons.⁷⁰

10. As instructed by the letter from Staff, Gary Snadon, on behalf of Emerald Pointe, signed the disposition agreements for both water and sewer service and the accompanying new tariffs that were prepared by Staff. He then returned the agreements and Emerald Pointe's new tariffs to Randy Hubbs at the Commission.

11. After the documents were returned to the Commission, Dale Johansen, who was the manager of the Commission's water and sewer department in 2000,⁷¹ signed the disposition agreement on behalf of Staff. Staff, specifically Randy Hubbs of the Commission's Water and Sewer Department,⁷² submitted those documents to the Commission's Record Department on March 20, 2000, thereby opening the rate case that was assigned File No. SR-2000-595.⁷³

12. Consistent with Staff's practice at the time, a copy of the documents Staff submitted to the Commission's Records Department on March 20, 2000, were not mailed to Emerald Pointe.⁷⁴

13. However, the sewer tariff that was filed as part of File No. SR-2000-595 was not the same as Emerald Pointe's new sewer tariff that Gary Snadon returned to Staff to be filed. In the sewer tariff that was filed by Staff, the provision that allowed Emerald Pointe to charge a sewer commodity charge of \$3.50 per 1,000 gallons had been removed.⁷⁵ The usage charge remained in the water tariff that Staff submitted to the Commission.⁷⁶

⁶⁸ Snadon Rebuttal, Ex. 13, Schedule GWS-3.

⁶⁹ Transcript, Page 197, Lines 4-6 and Snadon Rebuttal, Ex. 13, Schedule GWS-3.

⁷⁰ Snadon Rebuttal, Ex. 13, Schedule GWS-3.

⁷¹ Transcript, Page 182, Lines 5-8.

⁷² Johansen Rebuttal, Ex. 16, Page 7, Lines 14-16.

⁷³ Johansen Rebuttal, Ex. 16, Page 6, Lines 9-12.

⁷⁴ Transcript, Page 183, Lines 16-25.

⁷⁵ Exhibit 6.

⁷⁶ Exhibit 4.

14. There is no documentation in Staff files that explains why the sewer tariff returned by Emerald Pointe was changed before Staff submitted it to the Commission and significantly, there is no correspondence or other indication in the file that Emerald Pointe was ever informed that Staff planned to remove the sewer commodity charge from the company's tariff.⁷⁷

15. Dale Johansen, who was the manager of the Commission's water and sewer department in 2000, testified that he would have expected Staff to send written correspondence to the company if Staff intended to correct a mistake in a tariff before submitting the tariff to the Commission.⁷⁸

16. Randy Hubbs, who was Staff's case coordinator for Emerald Pointe's 2000 rate case, has been retired from the Commission for several years. He lives in Jefferson City but was not called as a witness to testify at the hearing.⁷⁹

17. On May 4, 2000, the Commission issued an order approving the sewer tariff that Staff submitted to the Commission.⁸⁰

18. The Commission approved Emerald Pointe's sewer rate increase without conducting an evidentiary hearing, based on the agreement between Emerald Pointe and Staff. Public Counsel did not join in that agreement, but did not object to it.⁸¹

19. The sewer tariff submitted by Staff to the Commission, excluding a commodity sewer charge, was entered into the Commission's records, specifically into a tariff book, as the Staff's sewer tariff for Emerald Pointe.⁸²

20. There is no evidence that the Commission sent a copy of the Commission approved tariff to Emerald Pointe.⁸³ The evidence showed that Gary Snadon did not receive a copy of the Commission approved sewer tariff from the Commission.⁸⁴

21. At the conclusion of the 2000 sewer rate case, Emerald Pointe began charging its customers the \$3.50 per 1,000 gallon sewer commodity charge that was included in the version of the tariff that was provided to Emerald Pointe by Staff and that was signed and returned to Staff by Gary Snadon as Emerald Pointe's tariff.⁸⁵

⁷⁷ Johansen Rebuttal, Ex. 16, Page 7- Lines 6-13. Staff's witness, James Busch, confirmed the lack of evidence that Emerald Pointe was informed of the change in the tariff at Transcript, Page 116, Lines 5-14.

⁷⁸ Transcript, Page 187, Lines 7-16.

⁷⁹ Transcript, Page 197, Lines 7-13.

⁸⁰ *In the Matter of Emerald Pointe Utility Company's Tariffs Designed for Sewer Rate Increase*, Case No. SR-2000-595, Order Approving Tariff, May 4, 2000.

⁸¹ *In the Matter of Emerald Pointe Utility Company's Tariffs Designed for Sewer Rate Increase*, Case No. SR-2000-595, Order Approving Tariff, May 4, 2000.

⁸² Exhibit 5, and Transcript, Page 185, Lines 10-13.

⁸³ Transcript, Pages 185-186, Lines 19-25, 1-7.

⁸⁴ Transcript, Page 170, Lines 3-5.

⁸⁵ Snadon Rebuttal, Ex. 13, Page 7, Lines 18-23.

22. Emerald Pointe continued to collect the sewer commodity charge from its customers until May 1, 2012. At that time, as it was preparing to make its current request for a sewer rate increase, Emerald Pointe's attorney noticed the discrepancy between the sewer tariff shown on the Commission's records and what Emerald Pointe believed to be its sewer tariff. Emerald Pointe informed Staff of the discrepancy and at Staff's request stopped collecting the usage charge.⁸⁶

23. Public Counsel's witness, Keri Roth, calculated that for the period between May 10, 2000, when Emerald Pointe began collecting the \$3.50 per 1,000 gallon sewer commodity charge from its customers, through March 31, 2012, Emerald Pointe collected \$346,650.34 from its customers by means of the sewer commodity charge. Public Counsel urges the Commission to require Emerald Pointe to refund that entire amount to its customers along with interest to date in the amount of \$156,445.38, for a total refund of \$503,095.71.⁸⁷ Public Counsel would have the refund amount continue to accrue compound interest until Emerald Pointe refunds the money to its customers.⁸⁸

24. Staff's witness, James Busch, recommended that the Commission require Emerald Pointe to refund \$187,683 to its customers, representing the money the company collected through the sewer commodity charge in the last five years before the discovery of what Staff believes to be an overcharge.⁸⁹

25. The workpapers preserved in Staff's file show that Staff agreed Emerald Pointe should receive an increase in sewer revenues in the amount of \$2,500, which is the ten percent increase the company requested. Based on then current revenues, plus the \$2,500 increase, Staff's workpapers show Emerald Pointe should have been allowed to collect total sewer operating revenues of \$35,909. The monthly customer charges incorporated in the tariff produced that amount of revenue without including any additional revenue from a sewer commodity charge. Thus, Staff never developed a sewer commodity charge for Emerald Pointe's sewer tariff.⁹⁰

26. Staff's workpapers from the 2000 rate case show Staff's audit of the company revealed that in 2000 Emerald Pointe needed a sewer revenue increase \$40,447 per year greater than the \$2,500 per year it requested.⁹¹ Including the \$3.50 per 1,000 gallon sewer commodity charge would have allowed Emerald Pointe to collect only an additional \$18,000 per year.⁹²

27. Staff's prevailing practice in 2000, within the small utility rate increase procedure, was to limit a company to a rate increase no greater than what the company requested.⁹³ Staff reasoned that if the company was dissatisfied with the rate increase it had requested, it could immediately request another rate increase.⁹⁴

⁸⁶ Snadon Rebuttal, Ex. 13, Page 8, Lines 4-10. See also, Busch Direct, Ex. 1, Page 5, Lines 5-10.

⁸⁷ Roth Rebuttal, Ex. 11, Page 8, Lines 6-10.

⁸⁸ Roth Rebuttal, Ex. 11, Page 9, Lines 1-4.

⁸⁹ Busch Direct, Ex. 1, Page 6, Lines 11-13. Staff would limit collection of the "overcharge" to five years based on application of Commission Rule 4 CSR 240-13.025. Staff would not add interest to the "overcharge".

⁹⁰ Busch Surrebuttal, Ex. 2, Pages 4-5, Lines 4-20, 1-12.

⁹¹ Johansen Rebuttal, Ex. 16, Pages 7-8, Lines 17-22, 1-16.

⁹² Johansen Rebuttal, Ex. 16, Page 8, Lines 17-22.

⁹³ Busch Surrebuttal, Ex. 2, Pages 3-4, Lines 23, 1-2.

⁹⁴ Transcript, Pages 190-191, Lines 4-25, 1.

28. Emerald Pointe did not request another sewer rate increase until 2012 when it instituted this case. Staff did not review Emerald Pointe's sewer rates until this case despite the Commission ordering it to do so by December 12, 2006.⁹⁵

29. Even while it collected the sewer commodity charge of \$3.50 per 1,000 gallons, Emerald Pointe's annual reports to the Commission show the company sustained a net operating loss on its sewer operations in every year except 2003.⁹⁶

30. Staff's witness, James Busch, testified to his belief that Emerald Pointe's collection of the sewer usage fee was a mistake rather than a willful violation of the company's tariff.⁹⁷

Conclusions of Law:

A. Section 393.140(11), RSMo 2000 gives the Commission authority to require utilities to file tariff schedules showing the rates the utility will charge its customers. The statutes goes on to state, in part: "No corporation shall charge, demand, collect or receive a greater or less or different compensation for any service rendered or to be rendered than the rates and charges applicable to such services as specified in its schedule filed and in effect at the time ...". There is nothing in the statute that gives the Commission's Staff authority to file a tariff on behalf of a regulated utility.

B. Section 386.270, RSMo 2000 provides:

All rates, tolls, charges, schedules and joint rates fixed by the commission shall be in force and shall be prima facie lawful, and all regulations, practices and services prescribed by the commission shall be in force and shall be prima facie lawful and reasonable until found otherwise in a suit brought for that purpose pursuant to the provisions of this chapter.

C. Although this issue concerning possible customer refunds is raised in the context of the company's request for a rate increase, it is not a rate case issue in that it does not concern the company's cost of service and the rates that are to be established to allow the company to recover those costs going forward. Instead, this issue concerns allegations by Staff and Public Counsel that the company has violated its tariff in the past. In effect, the allegations brought under this issue are a complaint against the company, as permitted by Section 386.390, RSMo 2000.

D. That distinction is important because, while Section 393.150.2, RSMo 2000, places the burden of proof on the company to establish that the rates it will charge are just and reasonable, the burden of proof is different when an allegation is made that a utility has violated a provision of its tariff. In that circumstance, the complainant as the party asserting the affirmative of an issue, has the burden of proof.⁹⁸ Thus Staff and Public Counsel, as the complaining parties, have the burden of proving that Emerald Pointe has violated its tariff.

⁹⁵ *In the Matter of the Application of Emerald Pointe Utility Company for a Certificate of Convenience and Necessity*, File No. WA-2004-0581, et al., Order Approving Application for Certificate of Convenience and Necessity, December 2, 2004. See Also, Pittman Rebuttal, Ex. 14, Page 5, Lines 10-18.

⁹⁶ Johansen Rebuttal, Ex. 16, Page 9, Lines 11-20 and Schedule DWJ-5.

⁹⁷ Transcript, Page 126, Lines 7-12.

⁹⁸ *State ex rel. GS Technologies Operating Co., Inc. v. Pub. Serv. Com'n*, 116 S.W.3d 680, 693, (Mo. App. W.D. 2003).

E. The Commission “is an administrative body only, and not a court, and hence the commission has no power to exercise or perform a judicial function, or to promulgate an order requiring a pecuniary reparation or refund.”⁹⁹ Thus, the Commission has no authority to order Emerald Pointe to make a refund to its customers. The Commission has authority, in the proper case, to determine whether Emerald Pointe has violated its tariff. But, if a party wishes to then seek a refund it would need to seek relief in the appropriate circuit court.

Decision:

In this case, the Commission is faced with two tariff documents that the opposing parties claim to be Emerald’s Pointe’s lawful sewer tariff. If Emerald Pointe’s lawful sewer tariff allows it to collect a usage charge of \$3.50 per 1,000 gallons, then the company’s collection of that charge from its customers cannot be a violation of its tariff. The tariff that Emerald Pointe contends is its lawful tariff contains such a usage charge. The tariff that Staff and Public Counsel contend is lawful does not.

In nearly every circumstance, a utility’s lawful tariff is the tariff that is filed by the utility and held on file with the Commission. However, that is not true in the unique circumstances under which Emerald Pointe’s sewer tariff was created in 2000. Under the Small Utility Rate Case procedures in effect in 2000, Staff presented Emerald Pointe with a disposition agreement prepared by Staff, that would allow the company to increase its sewer rates. The agreement itself simply stated that the rates would be increased by a specified amount but was silent as to how those additional rates would be collected from customers. Staff also drafted and presented Emerald Pointe with a new proposed sewer tariff that allowed the company to collect a sewer commodity charge of \$3.50 per 1,000 gallons. Since Emerald Pointe’s existing tariff included a sewer commodity charge there was no reason for Emerald Pointe to question the continuation of such a sewer commodity charge in the new proposed tariff prepared by the Commission Staff.

Emerald Pointe’s president signed the disposition agreement and issued the tariff that Staff had presented to him. Following Staff’s explicit instructions, Emerald Pointe’s president mailed the new tariff directly to Staff’s case coordinator on Staff’s representation that the case coordinator would in turn file that tariff with the Commission’s records department. However, Staff’s case coordinator filed a different version of the tariff with the Commission’s records department than the one Mr. Snadon delivered to the Commission. The tariff that Staff filed, a tariff that Emerald Pointe never received or reviewed, does not contain a sewer commodity charge.

Emerald Pointe quite reasonably believed that the tariff it issued was also the tariff that had been submitted to the Commission’s records department for inclusion in the company’s tariff book and that the tariff it had issued was in effect. Acting on that reasonable belief, Emerald Pointe collected the sewer commodity charge from its customers for nearly twelve years without objection from either Staff or Public Counsel. Even then, the confusion surrounding the sewer commodity charge was only identified by counsel for Emerald Pointe, who brought the discrepancy to the attention of Staff.

⁹⁹ *State ex rel. Laundry, Inc. v. Pub. Serv. Com’n*, 327 Mo. 93, 34 S.W.2d 37, 46 (Mo 1931).

Emerald Pointe did not issue the tariff that was on file with the Commission and it was not notified that the tariff presented to the Commission for approval and inclusion in the Commission's records was not the tariff issued by the company. Staff had no authority to file a tariff for Emerald Pointe and its presentation to the Commission of a tariff that was not issued by Emerald Pointe constituted a fraud against Emerald Pointe and the Commission.

It is likely that Staff mistakenly presented the wrong tariff to the Commission and there is no evidence of intentional wrongdoing by anyone. But, if Emerald Pointe had been made aware that the tariff on file with the Commission did not authorize it to recover a sewer commodity charge it could have returned to the Commission for another rate increase years sooner than it did while operating on the reasonable belief that the sewer commodity charge, and the revenue it produced, was authorized by the company's sewer tariff. In these circumstances, the tariff that was filed by Staff, and presented to the Commission for approval without the knowledge or approval of Emerald Pointe, is not the company's lawful tariff. As a result, Emerald Pointe should not be required to refund money collected pursuant to the sewer commodity charge to its customers.

In sum, the Commission finds that Staff and Public Counsel have failed to meet their burden of proving that the tariff that was presented to the Commission for approval in 2000 was Emerald Pointe's lawful tariff. Hence, Staff and Public Counsel have failed to prove that Emerald Pointe violated its tariff by collecting a sewer commodity charge from its customers.

This decision is limited to a determination that the complainants have failed to prove that Emerald Pointe has violated its lawful tariff. This decision does not authorize Emerald Pointe to collect any additional sums from its customers.

If the company is required to return to customers amounts collected through a sewer commodity charge:

- i. **What is the appropriate time period over which the amounts due to customers should be calculated?**
- ii. **What, if any, interest should be applied to the amounts to be returned?**
- iii. **If an over collection occurred, over what period of time should those amounts be redistributed to customers?**

These three sub-issues are moot as the Commission has found that the complainants have not met their burden of proving that Emerald Pointe' has violated its lawful tariff.

9. Late Fee/Reconnect Fee Overcharges:

- a. **Should interest be applied to the refund of late fee/reconnect fee overcharges?**
- b. **Over what period of time should those amounts be returned to customers?**

Findings of Fact:

1. Emerald Pointe's water and sewer tariffs allow the company to collect a late payment fee from its customers of two percent of the amount due or \$3.00, whichever is greater.¹⁰⁰ That provision is the same in both versions of the tariff discussed previously and is not disputed by the parties.

2. During its investigation of Emerald Pointe's request for a rate increase, Staff discovered the company has been charging its customers a late payment fee of ten percent.¹⁰¹

3. Staff also discovered Emerald Pointe has charged its customers a \$40 reconnect fee rather than the \$30 reconnect fee authorized in its tariff.¹⁰² Again, the provision is the same in both versions of the tariff and is not disputed by the parties.

4. Staff calculated Emerald Pointe over collected \$4,172 in late fees and \$280 of overcharged reconnection fees.¹⁰³

5. Emerald Pointe agrees with Staff's calculation of the overcharges and agrees to refund that money to its customers.¹⁰⁴

6. Staff initially proposed Emerald Pointe be required to pay six percent interest to its customers on the overcharged late fees and reconnection charges. Such interest charges would add \$1,631 to the late fee overcharges and \$53.65 to the reconnection fee overcharges.¹⁰⁵ Staff backed away from its demand for inclusion of interest in its post-hearing brief. However, Public Counsel continues to advocate for inclusion of interest on the refunds.

7. Emerald Pointe's tariff does not specify that interest is to be included on overcharged late fees and reconnection fees. Staff applied a six percent interest rate by analogy to the six percent interest rate specified in the tariff for collection and holding of customer deposits.¹⁰⁶

8. Staff and Public Counsel ask the Commission to order Emerald Pointe to refund the overcharged late fees and reconnection fees to customers within 90 days of the effective date of this report and order.¹⁰⁷

9. Emerald Pointe does not agree that interest in any amount should be added to the overcharged late fees and reconnection fees. It would return the reconnection fee overcharges in a single payment within 90 days, but would refund the overcharged late fees as a billing credit over 24 months.¹⁰⁸

10. Public Counsel advocates for the inclusion of interest based on the idea that customers should be compensated for the time value of the use of the money Emerald Pointe improperly collected from them.

¹⁰⁰ Busch Direct, Ex. 1, JAB Schedule 2.

¹⁰¹ Busch Direct, Ex. 1, Page 7, Lines 19-21.

¹⁰² Transcript, Page 230, Lines 11-18. See also Ex. 4.

¹⁰³ Busch Direct, Ex. 1, Page 8, Lines 1-4.

¹⁰⁴ Menke Rebuttal, Ex. 19, Page 4, Lines 1-9.

¹⁰⁵ Busch Direct, Ex. 1, Page 8, Lines 1-4.

¹⁰⁶ Rose Surrebuttal, Ex. 8, Page 9, Lines 1-7. See also, Transcript, Page 235, Lines 3-11.

¹⁰⁷ Busch Direct, Ex. 1, Page 8, Lines 10-12. See also, Roth Rebuttal, Ex. 11, Page 13, Lines 2-15.

¹⁰⁸ Menke Rebuttal, Ex. 19, Page 4, Lines 1-9 and Emerald Pointe's Brief, Page 16.

Conclusions of Law:

A. There is no provision in Emerald Pointe's tariff that would require the company to pay interest to customers in connection with refunds of overcharges for late fees and reconnection fees. Neither is there any statutory or regulatory provision that would authorize the Commission to require Emerald Pointe to pay interest to its customers in that circumstance.

B. The parties asserting the affirmative of an issue, in this case that refunds plus interest must be made, have the burden of proof.

C. Emerald Pointe concedes that it must refund the overcharges to its customers, but it does not concede that interest should be added to those refunds. Therefore, Public Counsel, the party advocating for the inclusion of interest must prove that the inclusion of interest is legal and appropriate. The Commission concludes Public Counsel has failed to carry that burden.

Decision:

The Commission concludes that there is no legal basis for requiring Emerald Pointe to add interest to the amounts it is refunding to its customers for overcharges for late fees and reconnection fees. However, the customers should be made whole as soon as reasonably possible. Therefore, the Commission will require Emerald Pointe to refund to its customers within 90 days the amounts it concedes it has overcharged.

10. Customer Deposits:**a. Over what period of time should deposits be returned to customers?****Findings of Fact:**

1. Emerald Pointe's water service tariff establishes certain criteria for the collection and holding of security deposits from customers. Staff's investigation during the course of the rate case determined that Emerald Pointe violated its tariff by requiring all water customers to make a deposit of \$30 upon requesting service. Furthermore, rather than refunding the deposit, with interest, upon the customer's completion of certain criteria, the company held the deposit until the customer left the system.¹⁰⁹

2. Staff recommends the Commission require the company to refund \$11,370 in deposits with an additional \$17,688 in interest to customers. Staff further recommends all customers for whom the company has existing records receive refunds of their deposits, with interest. Because the company's records are lacking for some customers, Staff recommends those customers, for whom proper records are lacking, receive a refund of their original deposit, plus interest from the time they were added to the system. Customers connected to the system within the last year and properly charged a deposit need not be given a refund, except as provided in the tariff.¹¹⁰

¹⁰⁹ Busch Direct, Ex. 1, Page 8, Lines 14-22.

¹¹⁰ Busch Direct, Ex. 1, Page 9, Lines 1-10.

3. Emerald Pointe accepts Staff's recommendation regarding the refund of customer deposits with interest as calculated by Staff.¹¹¹

4. Staff, supported by Public Counsel, proposes Emerald Pointe refund all improperly collected and held customer deposits with interest within 90 days of the effective date of this report and order.¹¹²

5. Emerald Pointe proposes customer deposits and interest be returned to customers through a bill credit over a 24-month period for existing customers and through a one-time payment to former customers who have left the system.¹¹³

Conclusions of Law:

A. The parties asserting the affirmative of an issue, in this case that refunds plus interest must be made, have the burden of proof.

B. Emerald Pointe's water service tariff establishes certain criteria for when the company can collect and hold a security deposit from its customers. That tariff specifically provides the company must pay "interest at the rate of 6% per annum compounded annually" on all deposits.

C. For this issue, the company's tariff explicitly requires the payment of interest at six percent in connection with customer deposits held by the company. Therefore, the parties advocating for a refund including interest have met their burden.

Decision:

Emerald Pointe has not complied with the provisions of its tariff with regard to its handling of security deposits collected from its customers. Those deposits, plus interest, should be returned to customers as soon as possible. Therefore, the Commission will order Emerald Pointe to refund those amounts to customers within 90 days.

THE COMMISSION ORDERS THAT:

1. Emerald Pointe Utility Company is authorized to file a tariff sufficient to recover revenues as determined by the Commission in this order.

2. Emerald Pointe Utility Company shall refund all overcharged late fees and reconnection fees to customers within 90 days of the effective date of this revised report and order.

¹¹¹ Menke Rebuttal, Ex. 19, Page 3, Lines 13-20.

¹¹² Busch Direct, Ex. 1, Page 9, Lines 8-10. See also Roth Rebuttal, Ex. 11, Pages 4-15.

¹¹³ Emerald Pointe's Brief, Page 16.

3. Emerald Pointe Utility Company shall refund all improperly collected and held security deposits, plus interest, to its customers within 90 days of the effective date of this revised report and order.

4. This revised report and order shall become effective on October 24, 2013.

R. Kenney, Chm., Stoll, and W. Kenney, CC., concur;
and certify compliance with the
provisions of Section 536.080,
RSMo.

Dated at Jefferson City, Missouri,
on this 24th day of September, 2013.

NOTE: Affirmed: *In re Request for an Increase in Sewer Operating Revenues of Emerald Pointe Utility Co.*, 438 S.W.3d 482 (Mo. App. W.D. 2014)

In the Matter of the Joint Application of Moore Bend Water Company, Inc. and Moore Bend Water Utility, LLC for Authority of Moore Bend Water Company, Inc. to Sell Certain Assets to Moore Bend Water Utility, LLC

File No. WM-2012-0335

CERTIFICATES

§34. Public convenience and necessity or public benefit

The Commission had already granted permission for seller to transfer assets to buyer, so the Commission granted the buyer's application for a certificate of convenience and necessity to operate those assets.

**ORDER GRANTING CERTIFICATE OF
CONVENIENCE AND NECESSITY AND DIRECTING
COMPANY TO FILE ADOPTION
NOTICE**

Issue Date: October 9, 2013

Effective Date: October 19, 2013

Background

On April 24, 2013, the Commission issued an order authorizing the transfer of assets from Moore Bend Water Company, Inc. to Moore Bend Water Utility, LLC. However, because Moore Bend Water Utility did not have a Certificate of Convenience and Necessity, the Commission ordered that the transfer would not be effective until the company secured an order granting such certificate. The company has filed a request for a certificate and the Staff of the Commission recommends that the Commission immediately grant the requested authority. Specifically, Staff recommends that the Commission:

- Immediately issue to Moore Bend Water Utility a Certificate of Convenience and Necessity and authorize the company to, on an interim basis, operate under Moore Bend Water Company's existing tariff until the Utility's adoption notice tariff sheet becomes effective;
- Immediately cancel the existing Certificate held by Moore Bend Water Company;
- Direct Moore Bend Water Utility to, within 5 days after an order granting a certificate, submit an adoption notice tariff sheet, along with a revised index sheet similar to Attachment B to Staff's memorandum filed on July 9, 2012.

Discussion

When granting a Certificate of Convenience and Necessity, the Commission questions: (1) whether there is a need for the service; (2) whether the applicant is qualified to provide the service; (3) whether the applicant has the financial ability to provide the service; (4) whether the applicant's proposal is economically feasible; and (5) whether the service promotes the public interest.¹

¹ *In re Tartan Energy Company*, 2 Mo. P.S.C. 173, 177 (1994).

This case is different from usual “certificate” case. Generally, when granting certificates, the Commission has before it either a new utility seeking to provide service or an existing utility seeking to provide service in a new area. The above-numbered questions are then directly relevant. This order, however, concerns a certificate case within a transfer of assets case, a transfer that has been approved by the Commission. Nevertheless, the Commission will address those same questions put to the parties in “normal” certificate cases.

The first inquiry is whether there is a need for service. As noted in the Commission’s order authorizing the transfer of assets, 90 customers are being served by this water system. Therein is the need. The second and third inquiries are whether the applicant is qualified and financially able to provide service. As also pointed out in the Commission’s order authorizing the transfer, the parties agree that Moore Bend Water Utility has the managerial, technical and financial ability to operate the water system. The fourth inquiry of whether the applicant’s proposal is economically feasible is relevant only to a new service territory. Finally, in its order, the Commission found that it is in the public interest to authorize the transfer of asset to Moore Bend Water Utility. It follows that it is in the public interest to grant a certificate to company, which it needs in order to provide service.

Decision

Having reviewed Staff’s recommendation, and in consideration of those findings set out in the Commission’s order authorizing the transfer of asset, the Commission will grant to Moore Bend Water Utility a Certificate of Convenience and Necessity.

THE COMMISSION ORDERS THAT:

1. Moore Bend Water Utility, LLC is granted a Certificate of Convenience and Necessity and is authorized to operate under the existing tariff of Moore Bend Water Company, Inc.
2. The Certificate of Convenience and Necessity issued to Moore Bend Water Company, Inc. is cancelled.
3. Moore Bend Water Utility, LLC shall, within 5 days after the effective date of this order, submit an adoption notice tariff sheet, as described in the Staff of the Commission’s recommendation and set out in the body of this order.
4. This order shall become effective on October 19, 2013.

R. Kenney, Chm., Stoll,
W. Kenney, and Hall, CC., concur.

Jones, Senior Regulatory Law Judge

In the Matter of Entergy Arkansas, Inc.'s Notification of Intent to Change Functional Control of Its Missouri Electric Transmission Facilities to the Midwest Independent Transmission System Operator Inc. Regional Transmission System Organization or Alternative Request to Change Functional Control and Motions for Waiver and Expedited Treatment

File No. EO-2013-0431

ELECTRIC

§46. Relations between connecting companies generally

The Commission approved the application of an electrical corporation to migrate functional control of its assets from one regional transmission organization to another, subject to conditions protecting Missouri ratepayers, and the safety and reliability of the transmission grid in Missouri.

REPORT AND ORDER

Issue Date: October 9, 2013

Effective Date: November 8, 2013

APPEARANCES

Timothy R. Schwarz, Jr., Esq. and Stephanie Bell, Esq., Blitz, Bardgett & Deutsch., 308 East High Street, Suite 301, Jefferson City, Missouri 65101, for Entergy Arkansas, Inc.

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Brett Leopold, Esq., 3500 SW Fairlaw Road, Suite 101, Topeka, Kansas 66614, for ITC Midsouth, LLC.

Dean L. Cooper, Esq., Brydon, Swarengen & England, P.C., 312 East Capitol Avenue, Post Office Box 456, Jefferson City, Missouri 65102 -0456, for The Empire District Electric Company.

Douglas Healy, Esq., Healy & Healy, LLC, 939 Boonville, Suite A, Springfield, Missouri 65802, for Missouri Joint Municipal Electric Utility Commission.

Roger W. Steiner, Esq., Kansas City Power & Light Company, 1200 Main Street, 16th Floor, Kansas City, Missouri 64105, for Kansas City Power & Light Company and KCP&L Greater Missouri Operations Company.

Anne E. Callenbach, Esq., Polsinelli PC, 6201 College Boulevard, Overland Park, Kansas 66211, for Kansas City Power & Light Company and KCP&L Greater Missouri Operations Company

Lewis R. Mills, Jr., Esq., Public Counsel, Office of the Public Counsel, 200 Madison Street, Suite 650, Post Office Box 2230, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the public.

Kevin A. Thompson, Esq., and Nathan Williams, Esq., Chief Staff Counsel and Deputy Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

REGULATORY LAW JUDGE: Ronald D. Pridgin, Senior Regulatory Law Judge

Procedural History

On March 11, 2013, Entergy Arkansas, Inc., (“EAI”) filed a Notification of Intent to change function control of its Missouri electric transmission facilities to The Midcontinent Independent Transmission System Operator, Inc., (“MISO”)¹. The Commission allowed The Empire District Electric Company (“Empire”), the Missouri Joint Municipal Electric Utility Commission (“MJMEUC”), Kansas City Power & Light Company (“KCP&L”), and KCP&L Greater Missouri Operations Company (“GMO”) to intervene. The Commission convened an evidentiary hearing on June 18, 2013.

The Issues

Being unable to agree on how to phrase many issues, the Joint Applicants worked from one list of issues, whereas the other parties worked from a separate list of issues. The Commission phrases and resolves the issues as follows:

Issue 1 - Does the Commission have jurisdiction in this case?

Issue 2 – Should the Commission find and conclude that the proposed MISO integration is not detrimental to the public interest in Missouri?

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact and conclusions of law. The positions and arguments of all of the parties have been considered by the Commission in making this decision.

Findings of Fact

1. EAI is a corporation organized and existing under the laws of the State of Arkansas and holds a certificate of convenience and necessity from the Commission.²
2. EAI has limited high voltage transmission facilities in the following Missouri counties: Dunklin, New Madrid, Oregon, Pemiscot, and Taney.³
3. Those facilities make up approximately 87.34 miles of transmission line in Missouri.⁴
4. EAI decided to join MISO after an extensive analysis and review begun in 2005, after determining that EAI should terminate its participation in the Entergy System Agreement effective December 18, 2013.⁵

¹ Formerly known as The Midwest Independent System Operator, Inc.

² Notification of Intent filed by EAI on March 21, 2013, paragraph 5.

³ Riley Direct, Ex. 3, Page 7, Lines 8 through 12. See also Notification of Intent filed by EAI on March 21, 2013 (Ex. A).

⁴ Tr. Page 64., Lines 13-18.

⁵ Riley Direct, Ex. 3, Page 9, Line 21 through Page 10, Line 4.

5. The Entergy Operation Companies chose MISO because that would provide the greatest benefits and least risk to their retail customers.⁶

6. Those benefits include nearly \$1.4 billion in estimated production cost savings (\$263 million to EAI's retail customers).⁷

7. All five state regulatory agencies having jurisdiction over the retail rates of the Entergy Operation Companies have now granted, subject to conditions, the request to integrate EAI's respective transmission assets into MISO.⁸

8. Upon integration into MISO, EAI would take transmission service under the MISO Tariff and MISO would be responsible for scheduling service and perform any security functions, such as transmission outage scheduling.⁹

9. Greater economies of scale resulting from the integration of the Entergy Operating Companies into MISO would have a positive impact of more than \$100 million annually on existing MISO members, including Ameren Missouri.¹⁰

10. Ameren Missouri, and thus its customers, could experience \$9 million of these annual benefits.¹¹

11. The benefits would result from more efficient commitment and dispatch, lower reserve margin requirements, lower ancillary service requirements, and lower administrative fees.¹²

12. GMO has four firm point-to-point transmission service reservations on Entergy's Open Access Same-time Information System ("OASIS"). These reservations are for 75 megawatts ("MW") each, for a total of 300 MW, sourcing at the Crossroads generation station in Clarksdale, Mississippi, within the Entergy footprint, and sinking at the American Electric Power Central and Southwest Balancing Area ("CSWS"), where it is picked up on Southwest Power Pool Inc.'s ("SPP") transmission service and sinks at GMO. This transmission service uses, among other facilities, the Entergy to SPP interconnections at the Omaha switching station to Ozark Beach. These Missouri facilities are part of the assets EAI plans to transfer to ITC.¹³

13. The estimated financial impact to GMO for the increases in transmission service as a result of EAI moving to the MISO Tariff is a cost of \$6,095,917.¹⁴

14. Empire is a co-owner of the Plum Point Energy Station, a 670 MW coal-fired generating facility near Osceola, Arkansas. Empire owns approximately a 7.52% interest in Plum Point, or approximately 50 MW, and also has a 30-year purchase power agreement for an additional 7.5% of Plum Point Capacity.¹⁵

⁶ *Id.* at page 11, Lines 13-16.

⁷ Tr. p. 87, lines 9-22.

⁸ Riley Direct, Ex. 3, Page 11, Line 16 through Page 12, Line 3.

⁹ *Id.* at Page 18, Line 19 through Page 19, Line 3.

¹⁰ Riley Surrebuttal, Ex. 4, Page 24, Line 14 through Page 27, Line 4.

¹¹ Tr. Page 74, Lines 14-24.

¹² *Id.* at p. 25, line 14 through p. 26, line 3.

¹³ Carlson Rebuttal, Ex. 18 NP, Pages 3-4.

¹⁴ *Id.* at pp. 5-6.

¹⁵ Warren Rebuttal, Ex. 20, Page 8.

15. Empire also has a critical 161kV bulk electric system interconnection with EAI at Empire's Powersite Substation, located near the Ozark Beach Hydro Plant near Forsyth, Missouri.¹⁶

16. Delivery of Plum Point capacity and energy relies directly on the service availability of this 161 kV interconnection that is one of the facilities subject to the pending application.¹⁷

17. Because Plum Point is physically located on EAI's transmission system, Empire has long-term point to point transmission service under Schedule 7 of Entergy's OATT. Once EAI's transmission assets are transferred to MISO, Empire will be forced to convert its Plum Point transmission service to service under the MISO tariff. Empire estimates that its Missouri customers will see an annual increase in rates of approximately \$1 million due to this conversion.¹⁸

18. ITC Midsouth estimates that in 2013, wholesale transmission rates will increase by approximately 8.1% over projected wholesale transmission rates for the Arkansas pricing zone, which includes Missouri facilities.¹⁹

19. But this 8.1% figure is merely the incremental percentage increase in ITC Arkansas zonal transmission service rates after Entergy is under the MISO Tariff and the facilities are transferred to ITC.²⁰

20. The Commission must look instead at the overall cost increases of Entergy moving to the MISO Tariff, which is over a 100% price increase. For certain transmission paths, KCP&L and GMO's transmission rates are expected to more than double.²¹

21. Further, the increases in transmission rates when transmission service is moved to the MISO Tariff will result in counterparties offering lower prices for the same energy, in order to recover their increased transaction costs.²²

22. Ratemaking for KCP&L includes a credit for off-system sales, which is embedded in the overall rates for KCP&L's retail customers, and serves to reduce those overall costs. Because those customers get a credit for off-system sales any reduction in those sales will have a direct and negative effect on Missouri retail rates.²³

23. An estimate of the potential impact is greater than \$2 million.²⁴

24. Rate mitigation has been proposed in the context of a similar case pending in Arkansas.²⁵

¹⁶ *Id.* at pp. 5-6; Warren Surrebuttal, Ex. 21, pp. 6-7.

¹⁷ *Id.*

¹⁸ *Id.* at Page 10.

¹⁹ Bready Surrebuttal, Ex. 17, Pages 8-9.

²⁰ Tr. at 184.

²¹ *Id.*

²² Carlson Rebuttal, Ex. 18 NP, Pages 9-10.

²³ *Id.*

²⁴ Tr. at 186-87.

²⁵ Bready Surrebuttal, Ex. 17, pp. 11-12.

25. If Entergy facilities are integrated into MISO, MISO would then provide network service for Entergy, which means that power flows could be substantially altered. MISO would then dispatch all of the Entergy generators to meet the loads all across the new MISO footprint, which would include also the Entergy system at that point, and which will result in new flows across Missouri facilities.²⁶

26. Estimates suggest that these new flows could reach as high as 4,000 MW of additional north to south flow.²⁷

27. Entergy's lack of physical interconnection between MISO/Ameren and Entergy Arkansas will cause loop flows between SPP and MISO to be exasperated to the further detriment of the general public in western Missouri.²⁸

28. These new flows should be addressed in revisions to the Joint Operating Agreement between MISO and Southwest Power Pool to provide for more effective coordination.²⁹

Conclusions of Law

1. Failure to specifically address a piece of evidence, position or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision. When making findings of fact based upon witness testimony, the Commission will assign the appropriate weight to the testimony of each witness based upon their qualifications, expertise and credibility with regard to the attested to subject matter.³⁰

2. In making its determination, the Commission may adopt or reject any or all of any witnesses' testimony.³¹

3. Testimony need not be refuted or controverted to be disbelieved by the Commission.³²

4. The Commission determines what weight to accord to the evidence adduced.³³

5. "It may disregard evidence which in its judgment is not credible, even though there is no countervailing evidence to dispute or contradict it."³⁴

6. The Commission may evaluate the expert testimony presented to it and choose between the various experts.³⁵

²⁶ Tr. at 196-97.

²⁷ *Id.*

²⁸ Warren Rebuttal, Ex. 21, p. 10.

²⁹ Tr. at 198.

³⁰ Witness credibility is solely within the discretion of the Commission, who is free to believe all, some, or none of a witness' testimony. *State ex. rel. Missouri Gas Energy v. Public Service Comm'n*, 186 S.W.3d 376 389 (Mo. App. 2005).

³¹ *State ex rel. Associated Natural Gas Co. v. Public Service Commission*, 706 S.W.2d 870, 880 (Mo. App., W.D. 1985).

³² *State ex rel. Rice v. Public Service Commission*, 220 S.W.2d 61, 65 (Mo. banc 1949).

³³ *Id.*

³⁴ *Id.*

³⁵ *Associated Natural Gas, supra*, 706 S.W.2d at 882.

7. The Staff of the Commission is represented by the Commission's Staff Counsel, an employee of the Commission authorized by statute to "represent and appear for the commission in all actions and proceedings involving this or any other law [involving the commission.]"³⁶

8. The Public Counsel is appointed by the Director of the Missouri Department of Economic Development and is authorized to "represent and protect the interests of the public in any proceeding before or appeal from the public service commission[.]"³⁷

9. EAI is an electric corporation and a public utility subject to Commission jurisdiction.³⁸

10. EAI's Missouri facilities, according to its own statements in its application, are used for the transmission and distribution of electricity that is certainly used eventually for "light, heat or power."³⁹

11. A Missouri regulated utility must obtain permission from the Commission to transfer functional control of any part of its electric plant to MISO.⁴⁰

12. A Regional Transmission Organization must have operational authority for all transmission facilities under its control.⁴¹

13. MISO exercises this operational authority through functional control of transmission, but the direct, physical control of transmission facilities is retained by the transmission owners, such as EAI.⁴²

14. The Commission must determine whether the proposed transaction is likely to be a net benefit or a net detriment to the public.⁴³

15. All of the benefits and detriments in evidence must be considered.⁴⁴

16. In reviewing another utility's application to transfer functional control of its transmission assets to MISO, this Commission stated that it is not limited to a simple thumbs up or thumbs down ruling on the transfer as a whole. If it is to adequately protect the public interest, the Commission must be able to impose conditions designed to alleviate specific detriments that would otherwise result from the transfer, even if the transfer overall would not be detrimental to the public.⁴⁵

17. The Commission must engage in a cost-benefit analysis in which all of the benefits and detriments in evidence are considered.⁴⁶

³⁶ Section 386.071.

³⁷ Sections 386.700 and 386.710.

³⁸ Section 386.020(15), (42) RSMo 2006 (all statutory cites to RSMo 2006 unless otherwise indicated).

³⁹ *Id.*

⁴⁰ Section 393.190.1 RSMo; *In re Union Electric Company*, File No. EO-2011-0128, Report and Order (April 19, 2012).

⁴¹ 18 C.F.R. § 35.34(j)(3).

⁴² *Midwest Indep. Transmission Sys. Operator, Inc.*, 84 FERC ¶ 61,231, at 62,160 (1998).

⁴³ *Intercon Gas, Inc. v. PSC*, 848 S.W.2d 593, 597-98 (Mo. App. W.D. 1993).

⁴⁴ *AG Processing, Inc. v. PSC*, 120 S.W.3d 732 (Mo. banc 2003).

⁴⁵ See *In re Union Elec. Co.*, Commission File No. EO-2011-0128, Report and Order, p. 20 (April 19, 2012).

⁴⁶ See *AG Processing, Inc., v. PSC*, 120 S.W. 32 732 (Mo. banc 2003).

DECISION

The Commission has jurisdiction over the applicants and the proposed migration of the functional control of EAI's transmission assets into MISO. EAI has a certificate of convenience and necessity with the Commission. EAI owns electrical plant in Missouri that is being used to serve the public, and EAI wishes to transfer functional control of that plant to MISO. As such, as stated in Section 393.190.1 RSMo, the Commission has jurisdiction over the transfer.

Such a migration is not detrimental to the public interest if the Commission imposes conditions upon it so that Missouri ratepayers are held harmless and so that safety and reliability of the transmission grid in Missouri is ensured.

Without such conditions, ratepayers of Missouri's non-MISO utilities, namely, ratepayers of Empire, GMO and KCP&L, could suffer financial harm and have their electrical service disrupted. The lack of those conditions would be contrary to the Commission's statutory mandate of ensuring that Missourians receive safe, adequate and reliable utility service at just and reasonable rates.

THE COMMISSION ORDERS THAT:

1. Entergy Arkansas, Inc.'s migration of its Missouri transmission assets into The Midcontinent Independent System Operator, Inc., is approved, conditioned upon the negotiation and approval of a revised Joint Operating Agreement between Southwest Power Pool, Inc., and The Midcontinent Independent System Operator, Inc., addressing, at a minimum, the loop flow issues and other altered flows related to the Missouri seam between Southwest Power Pool, Inc., and The Midcontinent Independent System Operator, Inc., and conditioned upon a requirement that Entergy Arkansas, Inc., and/or ITC Midsouth, LLC, hold harmless non-MISO Missouri retail customers from all increased costs due to Entergy's potential transfer of functional control of its transmission assets to The Midcontinent Independent System Operator, Inc.

2. Beginning June 30, 2014, and every year thereafter on or about June 30 until otherwise ordered by the Commission, Entergy Arkansas, Inc., or its successors-in-interest shall file a report with the Commission concerning its participation in The Midcontinent Independent System Operator, Inc. Such report shall include the perspective of Entergy Arkansas, Inc., or its successors-in-interest, in the economic viability of remaining in The Midcontinent Independent System Operator, Inc., the safety and reliability of transmission service Entergy Arkansas, Inc., or its predecessors-in-interest, have provided to its customers, and the status of the Joint Operating Agreement between Southwest Power Pool, Inc., and The Midcontinent Independent System Operator, Inc.

3. This Report and Order shall become effective on November 8, 2013.

R. Kenney, Chm., Stoll, W. Kenney,
and Hall, CC., concur.

Dated at Jefferson City, Missouri,
on this 9th day of October, 2013.

NOTE: A Notice of Correction has been filed and is available in the official case files of the Public Service Commission.

In the Matter of Central Rivers Wastewater Utility, Inc. For a Certificate of Convenience and Necessity Authorizing it to Construct, Install, Own, Operate, Maintain, Control and Manage a Sewer System In Clinton County, Missouri

File No. SA-2014-0005

SEWER

§2. Certificate of convenience and necessity

The Commission granted the application of a sewer company for a certificate of convenience and necessity to provide service to a new subdivision, conditioned on acquiring access to the property on which a wastewater treatment facility was located.

ORDER GRANTING CERTIFICATE OF CONVENIENCE AND NECESSITY

Issue Date: October 23, 2013

Effective Date: November 2, 2013

On July 2, 2013, Central Rivers Wastewater Utility, Inc. ("Central Rivers") filed an application with the Missouri Public Service Commission ("Commission") requesting the Commission grant it a Certificate of Convenience and Necessity ("CCN") to construct, install, own, operate, maintain, control, and manage a sewer system for the public in an area in Clinton County, Missouri. The requested CCN would allow Central Rivers to provide wastewater treatment and collection system operation and maintenance in an area known as Country Hills Estates Subdivision in Clinton County, Missouri. No other sewer service is currently available in the subject territory.

Notice of the application was provided and a deadline was set for interested persons to intervene. No requests to intervene were received. On October 7, 2013, the Staff of the Commission filed its recommendation. Staff requested the Commission grant the CCN to Central Rivers, subject to certain conditions. Although Commission Rule 4 CSR 240-2.080(15) allows parties ten days to respond to pleadings, no party responded to Staff's recommendation; therefore, the Commission finds there are no objections to the Commission granting Central Rivers the CNN, subject to the conditions recommended by Staff. Since no party requested a hearing in this matter, the Commission may make a determination without conducting a hearing.¹

Section 393.170, RSMo (2000) requires a sewer corporation receive approval from the Commission prior to construction of a sewer system. The Commission may grant a sewer corporation a certificate of convenience and necessity to operate after determining that the construction and operation are either "necessary or convenient for the public service."² The Commission has stated five criteria that it will use:

- 1) There must be a need for the service;
- 2) The applicant must be qualified to provide the proposed service;
- 3) The applicant must have the financial ability to provide the service;
- 4) The applicant's proposal must be economically feasible; and
- 5) The service must promote the public interest.³

¹ *State ex rel. Deffenderfer Enterprises, Inc. v. Public Service Comm'n of the State of Missouri*, 776 S.W.2d 494 (Mo. App. W.D. 1989).

² § 393.170.3 RSMo (2000).

³ *In re Tartan Energy Company*, 3 Mo.P.S.C. 173, 177 (1994).

Based on the verified application and the verified recommendation of Staff, the Commission finds that granting Central Rivers' application for a certificate of convenience and necessity to provide sewer service meets the above listed criteria. The application will be granted.

The Commission reminds Central Rivers that failure to comply with its regulatory obligations may result in the assessment of penalties against it. These regulatory obligations include, but are not limited to, the following:

A) The Obligation to file an annual report, as established by section 393.140(6), RSMo (2000). Failure to comply with this obligation will make the utility liable for a penalty of \$100 and an additional \$100 per day that the violation continues. Commission Rule 4 CSR 240-3.640 requires water utilities to file their annual report on or before April 15 of each year.

B) The obligation to pay an annual assessment fee established by the Commission, as required by section 386.370, RSMo (2000). Because assessments are facilitated by order of the Commission, failure to comply with the order will subject the company to penalties ranging from \$100 to \$2,000 for each day of noncompliance pursuant to section 386.570, RSMo (2000).

C) The obligation to provide safe and adequate service at just and reasonable rates, pursuant to section 393.130, RSMo (Cum.Supp. 2012).

D) The obligation to comply with all relevant state and federal laws and regulations, including but not limited to, rules of this Commission, the Department of Natural Resources, and the Environmental Protection Agency.

E) The obligation to comply with orders issued by the Commission. If the company fails to comply, it is subject to penalties for noncompliance ranging from \$100 to \$2,000 per day of noncompliance, pursuant to section 386.570, RSMo (2000).

F) The obligation to keep the Commission informed of its current address and telephone number.

The certificate is granted conditioned upon the compliance of the company with all of these obligations, as well as the obligations listed below in the ordered paragraphs.

Moreover, if the Commission finds, upon conducting a hearing, that Central Rivers fails to provide safe and adequate service, or has defaulted on any indebtedness, the Commission shall petition the circuit court for an order attaching the assets, and placing the company under the control of a receiver, as permitted by Section 393.145, RSMo (Cum.Supp. 2012). As a condition of granting this certificate, the company hereby agrees that in the future, should the Commission determine a receiver process is appropriate, the company consents to the appointment of an interim receiver until such time as the circuit court grants or denies the petition for receivership.

Central Rivers is also placed on notice that Section 386.310.1, RSMo (2000), provides that the Commission can, without first holding a hearing, issue an order in any case "in which the commission determines that the failure to do so would result in the likelihood of imminent threat of serious harm to life or property."

Furthermore, the company is reminded that, as a corporation, its officers may not represent the company before the Commission. Instead, the corporation must be represented by an attorney licensed to practice in Missouri.

THE COMMISSION ORDERS THAT:

1. Central Rivers Wastewater Utility, Inc. is granted permission, approval, and a certificate of convenience and necessity to construct, install, own, operate, control, manage, and maintain a sewer system for the public in Clinton County, as more particularly described above.

2. The certificate of convenience and necessity is granted upon the conditions set out in the body of this order.

3. The Commission approves the existing customer rate of \$32.00 per month, along with the existing connection charges and service charges, applicable to the Country Hill Estates service area.

4. The Commission approves Central Rivers Wastewater Utility, Inc.'s existing approved depreciation rates that were prescribed by the Commission in File No. SA-98-530 to be applicable to the Country Hill Estates service area. Central Rivers Wastewater Utility, Inc. must submit new and revised tariff sheets for its existing tariff, including a map and written description of the Country Hill Estates service area, including reference to the Country Hill Estates service area within the index in the tariff, and indicating the applicability of the existing customer rates and service charges to this service area, within 30 days of the issuance of this order, with the tariff sheets to bear an effective date that is at least 30 days from the date the tariff sheets are submitted to the Commission.

5. Central Rivers Wastewater Utility, Inc. shall file a request for a rate review with the Commission within six months after the effective date of this order.

6. Central Rivers Wastewater Utility, Inc. shall acquire ownership of the property upon which the treatment facility is located within thirty days of the effective date of this order, or alternatively, acquire a permanent easement, to be filed with the Recorder of Deeds in Clinton County, which permits Central Rivers Wastewater Utility, Inc. to have sole access to the wastewater treatment facility as described in the Staff Recommendation.

7. If Central Rivers Wastewater Utility, Inc. obtains a permanent easement to the wastewater treatment facility, it shall enter into a new agreement with the current owner of the wastewater treatment facility that will prohibit the property owner from altering, modifying or in any way changing the wastewater treatment facility and further agree that this facility will not be sold, assigned, transferred or in any way change ownership unless it is to Central Rivers Wastewater Utility, Inc. or any successor entity. The agreement with the current owner shall also include language providing Central Rivers Wastewater Utility, Inc. with the exclusive use of the wastewater treatment facility to meet its obligations to serve its utility customers and construct, install, operate, maintain, control, manage and make all necessary repairs to the facility as needed.

8. Central Rivers Wastewater Utility, Inc. shall comply with all Missouri statutes and Commission rules, including the requirements to file its Annual Reports to the Commission and pay all of its Annual Assessments, in accordance with Commission rules, on a timely basis

9. Nothing in the Staff Recommendation or this order shall bind the Commission on any ratemaking issue in any future rate proceeding.

10. This order shall become effective on November 2, 2013.

R. Kenney, Chm., Stoll, W. Kenney,
and Hall, CC., concur.

Burton, Regulatory Law Judge

In the Matter of the Application of Union Electric Company d/b/a Ameren Missouri for the Issuance of an Accounting Authority Order Relating to its Electrical Operations

File No. EU-2012-0027

ACCOUNTING

§42. Accounting Authority Orders

ELECTRIC

§27. Accounting

§39. Costs and expenses

§43. Accounting Authority orders

When a natural disaster struck an electric corporation's largest customer, the electric corporation was unable to recover the costs of serving that customer, so the Commission granted the electric corporation authority to defer recording of the unrecovered amounts.

REPORT AND ORDER

Issued: November 26, 2013

Effective: December 26, 2013

The Missouri Public Service Commission is granting the application for an accounting authority order ("AAO").¹ The AAO accounts for unexpected lost revenue to recover fixed costs. The AAO only allows for deferred recording, does not guarantee recovery, and does not in any way bind the Commission as to future rate making treatment.

Procedure

The Commission has jurisdiction to decide the application.² Union Electric Company ("Ameren") has the burden of proof³ by a preponderance of the evidence⁴ and reasonable inferences.⁵ On that basis, the Commission finds the facts as follows.

¹ Electronic Filing and Information System ("EFIS") No. 1, *Verified Application for Accounting Authority Order*, filed on July 25, 2011. EFIS is accessible at <http://psc.mo.gov/default.aspx>.

² 4 CSR 240-20.030(1); 18 CFR 101, Account 182.3.B (emphasis added). The parties adverse to the application seek denial of the application based on late filing of the application, but they make no persuasive argument supporting a calculation of the deadline for filing an application for an AAO.

³ *State ex rel. Tel-Central of Jefferson City, Inc. v. Pub. Serv. Comm'n of Missouri*, 806 S.W.2d 432, 435 (Mo. App., W.D. 1991).

⁴ *State Board of Nursing v. Berry*, 32 S.W.3d 638, 641 (Mo. App., W.D. 2000).

⁵ *Farnham v. Boone*, 431 S.W.2d 154 (Mo. 1968).

Findings of Fact

1. Union Electric Company is a Missouri corporation doing business as “Ameren Missouri” to provide electric service for gain.⁶

2. Costs of providing electric service include fixed costs.⁷ Fixed costs are expenses that Ameren incurs to be capable of delivering electricity at full capacity at any given time, even though customers may not need that entire capacity at any given time. Fixed costs do not fluctuate with the amount of electricity sold.⁸

3. In January 2008, an ice storm struck southeast Missouri,⁹ cutting power to Ameren’s largest customer Noranda Aluminum, damaging Noranda’s operations, and reducing Noranda’s purchases of electricity for 14 months.¹⁰ As a result, Ameren collected less revenue than expected from Noranda.¹¹ The amount of unrecovered fixed costs attributable to serving Noranda during those 14 months is \$35,561,503.¹²

4. The \$35,561,503 of unrecovered fixed costs attributed to serving Noranda represented nearly 8.5% of the Company’s net income in 2009.¹³

Conclusions of Law

1. The Commission must always report its conclusions.¹⁴

2. An AAO is a mechanism to “defer” an item, which means to record an item to a period outside of a test year for consideration in a later rate action. Items eligible for deferral include an “extraordinary item”, an item that pertains to an event that is extraordinary, unusual and infrequent,¹⁵ and not recurring.¹⁶

⁶ EFIS No. 87, *Transcript* volume 2, page 177, Ins. 12 through 16.

⁷ EFIS No. 87, *Transcript* volume 2, page 176, Ins. 10 through 14.

⁸ EFIS No. 87, *Transcript* volume 2, page 108, Ins. 11 through 16.

⁹ EFIS No. 101, Ameren Exhibit No. 2, *Direct Testimony of Lynn M. Barnes*, page 3, line 3 through 12.

¹⁰ EFIS No. 100, Ameren Exhibit No. 1, *Surrebuttal Testimony of David N. Wakeman*, page 17, Ins. 5 through 12.

¹¹ EFIS No. 103, Ameren Exhibit No. 4, *Direct Testimony of Steven M. Wills*, page 3, Ins. 1 through 6.

¹² EFIS No. 87, *Transcript* volume 2, page 17, line 2 through 20; for Ameren, \$35,561,503 before taxes represents \$21,909,940 after taxes, *Id.* p. 50. Ins. 15 – 17.

¹³ EFIS No. 102, Ameren Exhibit 3, *Surrebuttal Testimony of Lynn M. Barnes*, page 6, Ins. 8 – 14.

¹⁴ Section 386.420.2, RSMo 2000.

¹⁵ Uniform System of Accounts (“USoA”) General Instruction 7, Account 434, and Account 435.

¹⁶ USoA, General Instruction 7.

3. Revenue not collected by a utility to recover its fixed costs, under some circumstances, is an “item” that may be deferred and considered for later rate making. This is consistent with Commission regulations regarding certain energy conservation programs which specify that lost revenue may constitute an item for recording.¹⁷ It is also analogous to the Cold Weather Rule, created by the Commission under its statutory authority,¹⁸ which expressly allowed for recovery of lost revenues.¹⁹ Such a deferral under this rule does not constitute illegal retro-active ratemaking because there is no rate being set for it is merely an accounting deferral.²⁰

4. Ameren has shown that its loss of \$35,561,503, which constitutes 8.5% of its net income, is extraordinary and material.²¹ Extraordinary items are deferred by recording them in Uniform System of Accounts (“USoA”)²² Accounts 182.3 and 254, regulatory assets and liabilities, respectively.²³

5. Recording in these accounts is in the public interest because it preserves an item for consideration when setting just and reasonable rates. But deferred recording does not guarantee recovery in any later rate action; recovery may be granted in whole, partially, or not at all.²⁴

For those reasons, the Commission makes its rulings as follows, subject to rehearing under Section 386.500, RSMo 2000.

¹⁷ 4 CSR 240-3.164(1)(M), which relates to certain conservation programs.

¹⁸ See 4 CSR 240-13.055, Cold Weather Maintenance of Service: Provision of Residential Heat-Related Utility Service During Cold Weather; Sections 386.250, 393.140, RSMo 2000 and 393.130, RSMo Supp. 2012.

¹⁹ State ex rel. Missouri Gas Energy v. Pub. Serv. Comm’n, 210 S.W.3d 330, 335-36 (Mo. App., W.D. 2006).

²⁰ State ex rel. Office of Public Counsel v. Missouri Public Service Comm’n, 301 S.W.3d 556, 571 (Mo. App., W.D. 2009).

²¹ To be considered an extraordinary item, the item should be more than approximately 5 percent of income, computed before extraordinary items. USoA, General Instruction 7.

²² 18 CFR Part 101, as incorporated to this Commission’s regulations at 4 CSR 240-20.030(1).

²³ USoA 407.4, “Regulatory Credits” sets forth that this account shall also be credited when appropriate, with the amounts debited to Account 182.3.

²⁴ State ex rel. Missouri Gas Energy v. Pub. Serv. Comm’n, 210 S.W.3d 330, 336 (Mo. App., W.D. 2006); Missouri Gas Energy v. Pub. Serv. Comm’n, State of Mo., 978 S.W.2d 434, 438 (Mo. App., W.D. 1998); EFIS No. 91, Staff Exhibit No. 3, *Rebuttal Testimony of Mark L. Oligschlaeger*, page 6, ln 11 - 16.

THE COMMISSION ORDERS THAT:

1. The *Verified Application for Accounting Authority Order* is granted.²⁵
2. This order shall become effective December 26, 2013.
3. This file shall close on December 27, 2013.

Stoll, W. Kenney, and Hall, CC, concur,
R. Kenney, Chm., dissents;
and certify compliance with the provisions of
Section 536.080, RSMo.

Jordan, Senior Regulatory Law Judge

²⁵ The Court of Appeals expressly acknowledged this possibility: "Ameren had other remedies available to it to address its unexpected retail revenue loss. [An Ameren witness] testified that Ameren could have sought an accounting authority relating to the lost revenue in a subsequent rate case." State ex rel. Union Elec. Co. v. Pub. Serv. Comm'n of State, 399 S.W.3d 467, 489-90 (Mo. App., W.D. 2013) (footnotes omitted)

NOTE: A Notice Of Correction has been filed and is available in the official case files of the Public Service Commission.

NOTE: Affirmed by Mo. Court of Appeals (W.D.) by Memorandum Opinion (Jan. 13, 2015)

**Earth Island Institute d/b/a Renew Missouri, et al. Complainants, v. Union Electric
Company d/b/a Ameren Missouri, Respondent.**

File No. EC-2013-0377, et al.

EXPENSE

§57. Purchases under contract

Renewable Energy Standards statutes provide for renewable energy credits, which certify energy as having come from renewable sources, but not necessarily energy sold to Missouri customers.

One statute that specifically exempted utilities of a certain description from standards for renewable energy portfolios did not irreconcilably conflict with, and did not impliedly repeal, another statute that generally set forth those standards.

A statute that specifically exempted utilities from standards for renewable energy portfolios was based on a reasonable and open-ended description, so that statute did not constitute an unconstitutional special law.

**ORDER DENYING MOTION FOR SUMMARY DETERMINATION OF
RENEW MISSOURI AND GRANTING MOTIONS TO DISMISS OF AMEREN
MISSOURI AND EMPIRE**

Issue Date: November 26, 2013

Effective Date: December 26, 2013

This order concerns the consolidated complaints brought by Earth Island Institute d/b/a Renew Missouri, and other complainants (Renew Missouri),¹ against Union Electric Company d/b/a Ameren Missouri and The Empire District Electric Company concerning the utilities' compliance with Missouri's Renewable Energy Standard (RES). That law was approved by Missouri's voters in November 2008 as Proposition C, and is now codified at Sections 393.1020-1035, RSMo (Supp. 2012).

Both complaints allege that Ameren Missouri and Empire have failed to comply with the RES requirements by 1) improperly relying on hydropower from hydroelectric facilities that Renew Missouri contends do not qualify as renewable energy resources under the RES statute; and 2) improperly relying on renewable energy credits (RECs) that were created before the renewable energy standards of Proposition C went into effect. Renew Missouri added a third count against Ameren Missouri, alleging that the company improperly relied on "unbundled" solar RECs that are not associated with power sold to Missouri consumers. Renew Missouri's complaint against Empire added a third count, arguing that the solar exemption the General Assembly gave to Empire in Section 393.1050, RSMo (Supp. 2012) is void.

¹ The other complainants are Missouri Coalition for the Environment, Missouri Solar Energy Industry Association, Wind on the Wires, The Alternative Energy Company, StraightUp Solar, and Missouri Solar Applications.

Renew Missouri, Ameren Missouri, and Empire all agree there are no facts in dispute and each contends the Commission should dispose of the complaints without a hearing. Ameren Missouri and Empire filed separate motions to dismiss Renew Missouri's complaints on July 23, 2013. On the same date, Renew Missouri filed a motion for summary determination against both Ameren Missouri and Empire. The parties have filed responsive pleadings, and the Commission heard oral argument regarding the dispositive motions on September 12.

On November 13, the Commission approved a stipulation and agreement in File No. ET-2014-0085, in which Renew Missouri agreed to dismiss counts I and II of its complaints against Ameren Missouri and Empire in these cases. On November 15, Renew Missouri complied with the terms of the stipulation and agreement by dismissing Counts I and II of its complaints against Ameren Missouri and Empire. Both Ameren Missouri and Empire consented to the dismissal of the complaints so under Commission Rule 4 CSR 240.2.116(1), the counts may be dismissed without an order of the Commission. Count III of both complaints remain to be decided by the Commission.

Count III as to Ameren Missouri – Unbundled RECs Findings of Fact

These material facts are alleged in Renew Missouri's Motion for Summary Determination and are not disputed by Ameren Missouri in its response to that motion.

1. For its compliance with the RES portfolio requirements in 2011, Ameren Missouri retired 14,971 solar RECs (SRECs) purchased from various third party brokers and taken from the Western Renewable Energy Generation Information System (WREGIS). Those RECs are "unbundled," meaning the energy associated with the production of the SRECs was never delivered to Missouri, or to any Ameren Missouri customer.

2. The Commission's RES rule as originally proposed included a geographic sourcing provision that would have required that RECs purchased for compliance with the RES portfolio requirements represent renewable energy that was actually delivered to Missouri customers. The Joint Committee on Administrative Rules suspended and the General Assembly rejected those provisions of the rule. Furthermore, the Commission withdrew the challenged provisions from the rule and they were never published as part of the rule by the Secretary of State.

Conclusions of Law

A. The applicable portion of section 393.1030.1, RSMo (Supp. 2012) states: "The portfolio requirements shall apply to all power sold to Missouri consumers whether such power is self-generated or purchased from another source in or outside of this state." That sentence merely establishes that the percentage of portfolio requirements established by the RES statute apply to all power sold by the electric utility to its Missouri customers. In other words, it establishes the method of calculation to convert the portfolio percentage to megawatt hours. (The total amount of power sold to Missouri customers multiplied by the applicable portfolio percentage).

B. The next sentence of the statute states: “A utility may comply with the standard in whole or in part by purchasing RECs.” In other words, a utility can comply with the statute’s portfolio requirements either by delivering renewable power to its Missouri customers or by purchasing RECs.

C. The statute defines a REC as a certificate of proof that electricity has been generated from a renewable energy source.² There is nothing in that definition or elsewhere in the statute that requires RECs to represent renewable energy delivered to Missouri customers.

D. The only way the Commission can publish a valid rule is to comply with the procedural requirements of Chapter 536, RSMo. Section 536.021, RSMo (Supp. 2012) requires that all proposed and final rules be published in the Missouri Register to be valid.

Decision

The RES statute does not require that a REC represent renewable energy delivered to Missouri customers. The Commission’s rule, as published by the Secretary of State, also does not impose such a requirement. Renew Missouri’s suggestion that JCAR acted beyond its authority in suspending the geographic sourcing provisions of the Commission’s rule is irrelevant to this complaint against Ameren Missouri because those provisions of the rule have never been published by the Secretary of State as provided in Chapter 536 and thus are not enforceable against Ameren Missouri.

Renew Missouri has not shown, and cannot show that Ameren Missouri has violated any statute, regulation, or tariff by relying on RECs not associated with power sold to Missouri customers to comply with the two percent portfolio requirement for 2011. For that reason, Count III of Renew Missouri’s complaint against Ameren Missouri must be dismissed.

Count III as to Empire – The Solar Exemption Findings of Fact

These material facts are alleged in Renew Missouri’s complaint against Empire and are admitted by the company in its answer to that complaint.

1. Empire relies on Section 393.1050, RSMo (Supp. 2012) to claim that it is exempt from all solar requirements under the RES statute, including its obligation to pay solar rebates and its obligation to obtain two percent of its renewable energy portfolio requirement from solar energy.

² Section 393.1025(4), RSMo (Supp. 2012).

Conclusions of Law

A. Section 393.1050, RSMo (Supp. 2012) states:

Notwithstanding any other provision of law, any electrical corporation as defined by subdivision 15 of section 386.020 which, by January 20, 2009, achieves an amount of eligible renewable energy technology nameplate capacity equal or greater than fifteen percent of such corporation's total owned fossil-fired generating capacity, shall be exempt thereafter from a requirement to pay any installation subsidy, fee, or rebate to its customers that install their own solar electric energy system and shall be exempt from meeting any mandated solar renewable energy standard requirements. ...

That statute was passed by the General Assembly and signed by the Governor to become effective in August 2008.

B. After Section 393.1050, RSMo (Supp. 2012) became effective, the voters of Missouri passed Proposition C, which became effective on November 4, 2008. The terms of Proposition C, the RES statute, do not exempt any electric utility from the solar energy requirements of that statute.

C. There are two provisions of the RES statute that are in dispute. First, a portion of Section 393.1030.1, RSMo (Supp. 2012) establishes portfolio percentages of renewable energy that each electric utility must meet. Those percentages increase from two percent in 2011-2013 to fifteen percent beginning in 2021. The statute also requires that "at least two percent of each portfolio requirement shall be derived from solar energy". That provision is sometimes referred to as the "solar carve out." Second, Section 393.1030.3 requires each electric utility to offer a solar rebate to its retail customers who install solar electric systems on their property. Empire has relied on Section 393.1050, RSMo (Supp. 2012) to claim exemption from both the solar carve out and the solar rebate provisions of the RES statute.

D. This complaint before the Commission is not Renew Missouri's first attempt to challenge the validity of Section 393.1050. It first attempted to challenge the statute in circuit court. However, in the *Evans v. Empire Dist. Elec. Co.*³ decision issued in 2011, the Missouri Court of Appeals affirmed the circuit court's dismissal of that complaint for failure to exhaust administrative remedies. In doing so, *Evans* held that the Public Service Commission has primary jurisdiction and required the complainants to first seek a ruling from the Commission before they could proceed to challenge the statute in circuit court.

E. The Court of Appeals in the *Evans* decision confirmed that this Commission has no authority to declare a statute invalid. However, the court found that the Commission has authority to review the provisions of Section 393.1050 and its application to Empire. In particular, the Court found that the Commission has primary jurisdiction to determine "whether a challenge to a statute, which purports to exempt certain utility companies from providing a rebate to customers who install solar electric systems is in irreconcilable conflict with the provision of a statute adopted by an initiative petition (Proposition C) ..." ⁴

³ 346 S.W.3d 313 (Mo. App. W.D. 2011)

⁴ *Evans* at 318.

F. In determining whether the two statutes are in “irreconcilable conflict”, the Commission must apply relevant rules of statutory construction. The rules of statutory construction are not to be applied rigidly, but the Commission must bear in mind that the main purpose of such rules of construction is to “determine legislative intent and give meaning to the statutory language.”⁵

G. An important rule of statutory construction is that “where two statutory provisions covering the same subject matter are unambiguous standing separately but are in conflict when examined together, a reviewing court must attempt to harmonize them and give them both effect.”⁶ Thus, if the statutes can be harmonized the Commission must read them together and apply both. However, “[i]f that harmonization is impossible, the general statute must yield to the statute that is more specific.”⁷ Moreover, “[w]here the special statute is later, it will be regarded as an exception to, or qualification of, the prior general one; and where the general act is later, the special will be construed as remaining an exception to its terms, unless it is repealed in express words or by necessary implication.”⁸

Decision

Renew Missouri contends Section 393.1050 is invalid for three reasons: first, it was an unlawful attempt by the General Assembly to amend an initiative before it was enacted; second, it was impliedly repealed by the subsequent passage of the RES statute by initiative; and third, it is an unconstitutional special law that could apply only to Empire.

Unlawful Attempt to Amend an Initiative

The first reason Renew Missouri offers for the invalidity of Section 393.1050 is an argument that the statute is an unlawful attempt by the legislature to modify an initiative provision while a vote of the people is pending. Renew Missouri cites *State ex rel. Drain v. Becker*⁹ for the proposition that the legislature is forbidden to repeal or modify a statute that is the subject of a pending initiative or referendum effort. However, *Drain v. Becker* addresses only the legislature’s treatment of a referendum and does not address the treatment of initiative provisions. There is reason to treat the two provisions differently.

A referendum is an attempt by the people to challenge and repeal a law passed by the legislature. In effect, a referendum can be seen as an appeal to the people of an act of the legislature. Just as an administrative body is precluded from acting regarding a matter that is under appeal to a court, a pending referendum-appeal should preclude the legislature from acting regarding the legislation that is being challenged. That is indeed the holding of *Drain v. Becker*.

⁵ *South Metro. Fire Prot. Dist. v. City of Lee’s Summit*, 278 S.W.3d 659, 666 (Mo. 2009).

⁶ *South Metro Fire Prot. Dist.* at 666

⁷ *City of Clinton v. Terra Found., Inc.*, 139 S.W.3d 186, 189 (Mo. App. W.D. 2004).

⁸ *State ex rel. McKittrick v. Carolene Prod. Co.*, 346 Mo. 1049, 1059, 144 S.W.2d 153, 156 (Mo. 1940).

⁹ 240 S.W. 229 (Mo. 1922).

In contrast, an initiative is an action by the people to step into the role of the legislature to pass new legislation. In that circumstance, there is no reason to preclude the legislature from acting on other, related aspects of an issue that are subject to a pending initiative so long as it does not interfere with the pending initiative. The question of whether the legislature interfered with the pending initiative when it passed Section 393.1050 leads into Renew Missouri's second argument about the invalidity of the statute.

Implied Repeal

Renew Missouri argues that the later passed initiative impliedly repealed conflicting provisions of the earlier-passed Section 393.1050. However, Renew Missouri's argument relies on the proposition that Section 393.1050 is in "irreconcilable conflict" with the later- passed initiative. Indeed, that is precisely the question the *Evans* court indicated the Commission has primary jurisdiction to address. After examining the question, the Commission concludes the two statutes are not in conflict.

Section 393.1050 begins with the phrase "[n]otwithstanding any other provision of law." The Missouri Supreme Court has held that the inclusion of that phrase into a statute "does not create a conflict, but eliminates the conflict that would have occurred in the absence of the clause. A conflict would be present, then, only if both statutes included a prefatory 'Notwithstanding' clause or if neither statute included such a clause."¹⁰ In other words, the inclusion of the "notwithstanding" phrase means section 393.1050 is a special act that carved out an exception to the general act of section 393.1030 rather than impliedly repealing the general act. That conclusion is affirmed when the actual terms of the statutes are examined.

Proposition C, specifically Section 393.1030, establishes renewable portfolio standards that all electric utilities must meet. Ultimately, those standards require the electric utilities to purchase or generate no less than fifteen percent of the electricity they sell from renewable resources by no later than 2021. Section 393.1050 does not change those portfolio standards; all electric utilities must still comply. However, in passing Section 393.1050, the General Assembly recognized that an electric utility that was already meeting the fifteen percent renewable portfolio standard in 2008 was in a different position than other electric utilities that had not met that standard.

For an electric utility already meeting the fifteen percent renewable standard, the solar carve out and the solar rebate provisions would impose an extra compliance burden on a utility that had already, in the General Assembly's determination, gone the extra mile to offer renewable energy to its customers. Thus, the provisions of Section 393.1050 do not irreconcilably conflict with the renewable portfolio standards enacted by initiative in Section 393.1030. Rather Section 393.1050 is merely a rational modification of those standards to ease the burden the solar carve out and solar rebate provisions would otherwise impose on an electric utility that had already met the initiative's overall portfolio standards. Since the two statutes are not in irreconcilable conflict, the passage of Section 393.1030 by initiative did not impliedly repeal Section 393.1050.

¹⁰ *State ex rel. City of Jennings v. Riley*, 236 S.W.3d 630, 632 (Mo. 2007).

Unconstitutional Special Law

Renew Missouri's third argument against the validity of Section 393.1050 is that it is an unconstitutional special law that could apply only to Empire. Article III, Section 40 of the Missouri Constitution denies the legislature authority to pass local and special laws. A general law relates to persons or things as a class, while a special law relates to a particular person or thing of a class.¹¹ Under that standard, a consideration of the classification imposed by the statute is key. Classifications based on factors that can change or are open-ended are presumed constitutional. Laws that use such classifications are not special and are constitutional if the classification is made on a reasonable basis.¹²

In contrast, a statute that uses a closed-ended classification is facially special and is presumed unconstitutional unless a substantial justification for the classification can be demonstrated.¹³

Section 393.1050 allows an electrical corporation to take advantage of the solar exemption if it achieves a fifteen percent renewable energy standard by January 20, 2009. That is an open-ended classification available to any electrical corporation making the effort to comply. Thus, the statute is presumed constitutional and is valid if there is a reasonable basis for the classification. As previously discussed, the legislative classification in Section 393.1050 is a reasonable effort to ease the burden the solar carve out and solar rebate provisions would otherwise impose on an electric utility that had already met the initiative's overall portfolio standards. Thus, Section 393.1050 does not violate the Missouri Constitution.

Renew Missouri has not shown, and cannot show that Empire has violated any statute, regulation, or tariff by relying on the solar exemption found in Section 393.1050, nor has it shown, nor can it show, that Section 393.1050 is invalid or unconstitutional. For that reason, Count III of Renew Missouri's complaint against Empire must be dismissed.

THE COMMISSION ORDERS THAT:

1. The Motion for Summary Determination of Earth Island Institute d/b/a Renew Missouri, Missouri Coalition for the Environment, Missouri Solar Energy Industry Association, Wind on the Wires, The Alternative Energy Company, StraightUp Solar, and Missouri Solar Applications is denied.

2. Union Electric Company d/b/a Ameren Missouri's Motion to Dismiss is granted, and the complaint against Ameren Missouri is dismissed.

3. The Empire District Electric Company's Motion to Dismiss Complaint is granted, and the complaint against Empire is dismissed.

4. This order shall become effective on December 26, 2013.

R. Kenney, Chm., Stoll, W. Kenney and Hall, CC., concur;
Woodruff, Chief Regulatory Law Judge

NOTE: Reversed in part: *Earth Island v. Union Electric Co.*, 456 S.W. 3d 27, (Mo. Banc 2015)

¹¹ *Bd. of Educ. of St. Louis v. State Bd. of Educ.*, 271 S.W.3d 1, 9, (Mo. 2008).

¹² *Bd. of Educ.*, at 9.

¹³ *Bd. of Educ.*, at 10.

DIGEST OF REPORTS
OF THE
PUBLIC SERVICE COMMISSION
OF THE
STATE OF MISSOURI

LIST OF DIGEST TOPICS

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ACCOUNTING

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- §7. Duty to keep proper accounts generally
- §8. Uniform accounts and rules
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III. PARTICULAR ITEMS

- §10. Additions, retirements and replacements
- §11. Abandoned property
- §12. Capital account
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- §18. Financing costs
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- §20. Franchise cost
- §21. Incomplete construction
- §22. Interest
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- §24. Liabilities
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- §33. Retirement account
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- §36. Securities
- §37. Supervision and engineering
- §38. Taxes
- §38.1. Book/tax timing differences

- §39. Welfare and pensions
 - §39.1. OPEBS, Postretirement benefits other than pensions
 - §40. Working capital and current assets
 - §41. Expenses generally
 - §42. Accounting Authority Orders
 - §43. Financial Accounting Standards Board requirements
-

ACCOUNTING

§16. Deposits by patrons. Public utility's failure to comply with tariff provisions governing customer deposits was cause to require a refund of those deposits to customers. **23 MPSC 3d 199**

§42. Accounting Authority Orders. Deferred recording requires no Commission order because Commission regulations, which adopt the Uniform System of Accounts, already authorize deferred recording of extraordinary expenses; deferred recording for future expenses—a "tracker"—seeks to characterize an expense as extraordinary before it has occurred, a pre-judgment that the Uniform System of Accounts does not provide, so some other authority is necessary. **23 MPSC 3d 6**

§42. Accounting Authority Orders. When a natural disaster struck an electric corporation's largest customer, the electric corporation was unable to recover the costs of serving that customer, so the Commission granted the electric corporation authority to defer recording of the unrecovered amounts. **23 MPSC 3d 237**

CERTIFICATES

I. IN GENERAL

- §1. Generally
- §2. Unauthorized operations and construction
- §3. Obligation of the utility

II. JURISDICTION AND POWERS

- §4. Jurisdiction and powers generally
- §5. Jurisdiction and powers of Federal Commissions
- §6. Jurisdiction and powers of the State Commission
- §7. Jurisdiction and powers of local authorities
- §8. Jurisdiction and powers over interstate operations
- §9. Jurisdiction and powers over operations in municipalities
- §10. Jurisdiction and powers over the organizations existing prior to the Public Service Commission law

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- §11. When a certificate is required generally
- §12. Certificate from federal commissions
- §13. Extension and changes
- §14. Incidental services or operations
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- §22. Restrictions and conditions
- §23. Who may possess
- §24. Validity of certificate
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- §26. Public safety
- §27. Charters and franchises
- §28. Contracts
- §29. Unauthorized operation or construction
- §30. Municipal or county action
- §31. Rate proposals
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- §33. Immediate need for the service
- §34. Public convenience and necessity or public benefit
- §35. Existing service and facilities

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- §36. Preference between rival applicants generally
- §37. Ability and responsibility
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- §39. Priority of applications
- §40. Priority in occupying territory
- §41. Rate proposals

VI. CERTIFICATE OR PERMIT FOR PARTICULAR UTILITIES

- §42. Electric and power
- §43. Gas
- §44. Heating
- §45. Water
- §46. Telecommunications
- §46.1. Certificate of local exchange service authority

- §46.2. Certificate of interexchange service authority
- §46.3. Certificate of basic local exchange service authority
- §47. Sewers

VII. OPERATION UNDER TERMS OF THE CERTIFICATE

- §48. Operations under terms of the certificate generally
- §49. Beginning operation
- §50. Duration of certificate right
- §51. Modification and amendment of certificate generally

VIII. TRANSFER, MORTGAGE OR LEASE

- §52. Transfer, mortgage or lease generally
- §53. Consolidation or merger
- §54. Dissolution
- §55. Transferability of rights
- §55.1. Change of supplier
- §55.2. Territorial agreement
- §56. Partial transfer
- §57. Transfer of abandoned or forfeited rights
- §58. Mortgage of certificate rights
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IX. REVOCATION, CANCELLATION AND FORFEITURE

- §60. Revocation, cancellation and forfeiture generally
- §61. Acts or omissions justifying revocation or forfeiture
- §62. Necessity of action by the Commission
- §63. Penalties

CERTIFICATES

§1. Generally. The Commission approved applications to transfer assets and to build transmission lines with conditions determined by the Commission and by consent order. **23 MPSC 3d 160**

§6. Jurisdiction and powers of the State Commission. The Commission approved applications to transfer assets and to build transmission lines with conditions determined by the Commission and by consent order. **23 MPSC 3d 160**

§13. Extension and changes. The Commission granted a certificate of convenience and necessity for a gas company to expand its service area subject to separate accounting for the expansion and the filing of revised tariffs. **23 MPSC 3d 107**

§21. Grant or refusal of certificate generally. The Commission granted a certificate of convenience and necessity for a gas company to expand its service area subject to separate accounting for the expansion and the filing of revised tariffs. **23 MPSC 3d 107**

§21.1. Public interest. The Commission approved applications to transfer assets and to build transmission lines with conditions determined by the Commission and by consent order. **23 MPSC 3d 160**

§33. Immediate need for the service. The Commission approves an application for a certificate of convenience and necessity for a sub-transmission line to a new customer's business site. **23 MPSC 3d 110**

§34. Public convenience and necessity or public benefit
The Commission had already granted permission for seller to transfer assets to buyer, so the Commission granted the buyer's application for a certificate of convenience and necessity to operate those assets. **23 MPSC 3d 224**

§42. Electric and power. The Commission approves an application for a certificate of convenience and necessity for a sub-transmission line to a new customer's business site. **23 MPSC 3d 110**

The Commission approves an application for a certificate of convenience and necessity for a sub-transmission line to a new customer's business site. **23 MPSC 3d 160**

§43. Gas. The Commission granted a certificate of convenience and necessity for a gas company to expand its service area subject to separate accounting for the expansion and the filing of revised tariffs. **23 MPSC 3d 107**

The Commission granted a certificate of convenience and necessity for a gas company to expand its service area subject to separate accounting for the expansion and the filing of revised tariffs. **23 MPSC 3d 133**

§53. Consolidation or merger. The Commission approved the purchase of one gas company by another, granted a certificate of convenience and necessity to the buyer to serve the former service area of the seller, and approved financing in the amount of \$1.02 billion to pay for the acquisition. **23 MPSC 3d 133**

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I. IN GENERAL

- §1. Generally**
- §2. Right to allowance for depreciation**
- §3. Reports, records and statements**
- §4. Obligation of the utility**

II. JURISDICTION AND POWERS

- §5. Jurisdiction and powers generally
- §6. Jurisdiction and powers of the State Commission
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- §8. Jurisdiction and powers of local authorities

III. BASIS FOR CALCULATION

- §9. Generally
- §10. Cost or value
- §11. Property subject to depreciation
- §12. Methods of calculation
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IV. FACTORS AFFECTING ANNUAL ALLOWANCE

- §15. Factors affecting annual allowance generally
- §16. Life of enterprise
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V. RESERVES

- §25. Necessity
- §26. Separation between plant units
- §27. Amount
- §28. Ownership of fund
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VI. DEPRECIATION OF PARTICULAR UTILITIES

- §31. Electric and power
- §32. Gas
- §33. Heating
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- §35. Water

DEPRECIATION

No headnotes in this volume involved the question of depreciation.

DISCRIMINATION

I. IN GENERAL

- §1. Generally**
- §2. Obligation of the utility**
- §3. Recovery of damages for discrimination**
- §4. Recovery of discriminatory undercharge**
- §5. Reports, records and statements**

II. JURISDICTION AND POWERS

- §6. Jurisdiction and powers of the State Commission**
- §7. Jurisdiction and powers of the Federal Commissions**
- §8. Jurisdiction and powers of the local authorities**

III. RATES

- §9. Competitor's right to equal treatment**
- §10. Free service**
- §11. Inequality of rates**
- §12. Methods of eliminating discrimination**
- §13. Optional rates**
- §14. Rebates**
- §15. Service charge, meter rental or minimum charge**
- §16. Special rates**
- §17. Rates between localities**
- §18. Concessions**

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- §19. Bases for classification and differences**
- §20. Right of the utility to classify**
- §21. Reasonableness of classification**

V. RATES AND CHARGES OF PARTICULAR UTILITIES

- §22. Electric and power**
- §23. Gas**
- §24. Heating**
- §25. Telecommunications**
- §26. Sewer**
- §27. Water**

VI. SERVICE IN GENERAL

- §28. Service generally**
- §29. Abandonment and discontinuance**
- §30. Discrimination against competitor**
- §31. Equipment, meters and instruments**
- §32. Extensions**
- §33. Preference during shortage of supply**
- §34. Preferences to particular classes or persons**

VII. SERVICE BY PARTICULAR UTILITIES

- §35. Electric and power
- §36. Gas
- §37. Heating
- §38. Sewer
- §39. Telecommunications
- §40. Water

DISCRIMINATION

No headnotes in this volume involved the question of discrimination.

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I. IN GENERAL

- §1. Generally
- §2. Obligation of the utility
- §3. Certificate of convenience and necessity
- §4. Transfer, lease and sale
- §4.1. Change of suppliers
- §5. Charters and franchise
- §6. Territorial agreements

II. JURISDICTION AND POWERS

- §7. Jurisdiction and powers generally
- §8. Jurisdiction and powers of Federal Commissions
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- §13. Operations generally
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- §20. Rates
- §21. Refunds
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- §23. Return
- §24. Services generally

- §25. Competition
- §26. Valuation
- §27. Accounting
- §28. Apportionment
- §29. Rate of return
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- §33. Maintenance
- §34. Additions and betterments
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- §36. Local service
- §37. Liability for damage
- §38. Financing practices
- §39. Costs and expenses
- §40. Reports, records and statements
- §41. Billing practices
- §42. Planning and management
- §43. Accounting Authority orders
- §44. Safety
- §45. Decommissioning costs

IV. RELATIONS BETWEEN CONNECTING COMPANIES

- §46. Relations between connecting companies generally
- §47. Physical connection
- §48. Contracts
- §48.1 Qualifying facilities
- §49. Records and statements

ELECTRIC

§3. Certificate of convenience and necessity. The Commission approved applications to transfer assets and to build transmission lines with conditions determined by the Commission and by consent order.

23 MPSC 3d 160

§20. Rates. Purchasing green power generated by a local utility has environmental benefits. Those benefits also accrue from purchasing renewable energy credits combined with grid electricity, which a proposed tariff offered customers the option of doing. The Commission approved that tariff subject to annual reporting. **23 MPSC 3d 97**

§23. Return. Return on equity is not merely a matter of arithmetic, it is a multi-disciplinary exercise culminating in the application of the Commission's policy expertise, influenced by factors balancing or outweighing one another in permutations too numerous for any expert to fully catalogue and growing exponentially as experts compare each

other's models. **23 MPSC 3d 6**

Though succeeding to assets generally means succeeding to liabilities, the rescue of a distressed utility and preservation of service should not result in punitive action. **23 MPSC 3d 6**

§27. Accounting. When a natural disaster struck an electric corporation's largest customer, the electric corporation was unable to recover the costs of serving that customer, so the Commission granted the electric corporation authority to defer recording of the unrecovered amounts. **23 MPSC 3d 237**

§39. Costs and expenses. When a natural disaster struck an electric corporation's largest customer, the electric corporation was unable to recover the costs of serving that customer, so the Commission granted the electric corporation authority to defer recording of the unrecovered amounts. **23 MPSC 3d 237**

§43. Accounting Authority orders. When a natural disaster struck an electric corporation's largest customer, the electric corporation was unable to recover the costs of serving that customer, so the Commission granted the electric corporation authority to defer recording of the unrecovered amounts. **23 MPSC 3d 237**

§46. Relations between connecting companies generally. The Commission approved the application of an electrical corporation to migrate functional control of its assets from one regional transmission organization to another, subject to conditions protecting Missouri ratepayers, and the safety and reliability of the transmission grid in Missouri. **23 MPSC 3d 226**

EVIDENCE, PRACTICE AND PROCEDURE

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- §1. Generally**
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- §4. Presumption and burden of proof**
- §5. Admissibility**
- §6. Weight, effect and sufficiency**
- §7. Competency**
- §8. Stipulation**

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- §9. Particular kinds of evidence generally**
- §10. Admissions**
- §11. Best and secondary evidence**
- §12. Depositions**
- §13. Documentary evidence**

- §14. Evidence by Commission witnesses
- §15. Opinions and conclusions; evidence by experts
- §16. Petitions, questionnaires and resolutions
- §17. Photographs
- §18. Record and evidence in other proceedings
- §19. Records and books of utilities
- §20. Reports by utilities
- §21. Views

III. PRACTICE AND PROCEDURE

- §22. Parties
- §23. Notice and hearing
- §24. Procedures, evidence and proof
- §25. Pleadings and exhibits
- §26. Burden of proof
- §27. Finality and conclusiveness
- §28. Arbitration
- §29. Discovery
- §30. Settlement procedures
- §31. Mediator
- §32. Confidential evidence
- §33. Defaults

EVIDENCE, PRACTICE AND PROCEDURE

§2. Jurisdiction and powers. The Commission approved applications to transfer assets and to build transmission lines with conditions determined by the Commission and by consent order. **23 MPSC 3d 160**

§4. Presumption and burden of proof. A party seeking to abrogate a Commission order has the burden of proving that the order is unreasonable or unlawful “clear and satisfactory evidence,” which is the equivalent of clear and convincing evidence. **23 MPSC 3d 6**

§5. Admissibility. A motion to strike constituted an objection to testimony untimely made, so the Commission denied it. **23 MPSC 3d 6**

§22. Parties. Terms and conditions of union membership are not subject to the Commission’s authority and therefore do not support an application to intervene out of time. **23 MPSC 3d 110**

§23. Notice and hearing. Intervenor did not show that the Commission’s notice of a general rate action was inadequate. **23 MPSC 3d 6**

The Commission approved the acquisition of one water company by another, issued a certificate of convenience and necessity to the buyer for service in the seller’s former territory, and waived the pre-application

notice. **23 MPSC 3d 192**

§24. Procedures, evidence and proof. The Commission granted the parties' motion to withdraw amended proposed schedules of depreciation, and modified its earlier order to strike those amended schedules and substitute the schedules originally proposed. **23 MPSC 3d 126**

When parties sought relief without citing law authorizing such relief or facts relevant under such law, the Commission issued its consent order embodying the parties' terms without ruling on the merits of any pleading. **23 MPSC 3d 128**

§26. Burden of proof. A party seeking to abrogate a Commission order has the burden of proving that the order is unreasonable or unlawful "clear and satisfactory evidence," which is the equivalent of clear and convincing evidence. **23 MPSC 3d 6**

When seeking approval of a tariff, the proponent need not show that the resulting rate is just and reasonable if the tariff enacts a program in which consumers participate only voluntarily. **23 MPSC 3d 97**

§27. Finality and conclusiveness. A party seeking to abrogate a Commission order has the burden of proving that the order is unreasonable or unlawful "clear and satisfactory evidence," which is the equivalent of clear and convincing evidence. **23 MPSC 3d 6**

On matters pending before an appellate court, inconsistent rulings generate confusion and uncertainty, while a reservation of ruling furthers administrative and judicial economy. **23 MPSC 3d 6**

The Commission granted the parties' motion to withdraw amended proposed schedules of depreciation, and modified its earlier order to strike those amended schedules and substitute the schedules originally proposed. **23 MPSC 3d 126**

§30. Settlement procedures. When the Commission has no authority to order a provision of the parties' settlement, the Commission incorporates that provision into its order as a consent order. **23 MPSC 3d 6**

Parties may waive any procedure otherwise required before decision and, when a settlement disposes of an action, the Commission need not separately state its findings of fact. **23 MPSC 3d 68**

When parties sought relief without citing law authorizing such relief or

facts relevant under such law, the Commission issued its consent order embodying the parties' terms without ruling on the merits of any pleading. **23 MPSC 3d 128**

The Commission approved applications to transfer assets and to build transmission lines with conditions determined by the Commission and by consent order. **23 MPSC 3d 160**

EXPENSE

I. IN GENERAL

- §1. Generally**
- §2. Obligation of the utility**
- §3. Financing practices**
- §4. Apportionment**
- §5. Valuation**
- §6. Accounting**

II. JURISDICTION AND POWERS

- §7. Jurisdiction and powers of the State Commission**
- §8. Jurisdiction and powers of the Federal Commissions**
- §9. Jurisdiction and powers of local authorities**

III. EXPENSES OF PARTICULAR UTILITIES

- §10. Electric and power**
- §11. Gas**
- §12. Heating**
- §13. Telecommunications**
- §14. Water**
- §15. Sewer**

IV. ASCERTAINMENT OF EXPENSES

- §16. Ascertainment of expenses generally**
- §17. Extraordinary and unusual expenses**
- §18. Comparisons in absence of evidence**
- §19. Future expenses**
- §20. Methods of estimating**
- §21. Intercompany costs or dealings**

V. REASONABLENESS OF EXPENSE

- §22. Reasonableness generally**
- §23. Comparisons to test reasonableness**
- §24. Test year and true up**

VI. PARTICULAR KIND OF EXPENSE

- §25. Particular kinds of expenses generally
- §26. Accidents and damages
- §27. Additions and betterments
- §28. Advertising, promotion and publicity
- §29. Appraisal expense
- §30. Auditing and bookkeeping
- §31. Burglary loss
- §32. Casualty losses and expenses
- §33. Capital amortization
- §34. Collection fees
- §35. Construction
- §36. Consolidation expense
- §37. Depreciation
- §38. Deficits under rate schedules
- §39. Donations
- §40. Dues
- §41. Employee's pension and welfare
- §42. Expenses relating to property not owned
- §43. Expenses and losses of subsidiaries or other departments
- §44. Expenses of non-utility business
- §45. Expenses relating to unused property
- §46. Expenses of rate proceedings
- §47. Extensions
- §48. Financing costs and interest
- §49. Franchise and license expense
- §50. Insurance and surety premiums
- §51. Legal expense
- §52. Loss from unprofitable business
- §53. Losses in distribution
- §54. Maintenance and depreciation; repairs and replacements
- §55. Management, administration and financing fees
- §56. Materials and supplies
- §57. Purchases under contract
- §58. Office expense
- §59. Officers' expenses
- §60. Political and lobbying expenditures
- §61. Payments to affiliated interests
- §62. Rentals
- §63. Research
- §64. Salaries and wages
- §65. Savings in operation
- §66. Securities redemption or amortization
- §67. Taxes
- §68. Uncollectible accounts
- §69. Administrative expense
- §70. Engineering and superintendence expense
- §71. Interest expense

- §72. Preliminary and organization expense
- §73. Expenses incurred in acquisition of property
- §74. Demand charges
- §75. Expenses incidental to refunds for overcharges
- §76. Matching revenue/expense/rate base
- §77. Adjustments to test year levels
- §78. Isolated adjustments

EXPENSE

§11. Gas. An action filed as a complaint was really a prudence review, in which a showing of serious doubt as to the prudence of an expenditure places the burden of proving the prudence of that expenditure on the utility. **23 MPSC 3d 61**

The Commission approved revisions to a cost allocation manual as agreed by the parties to a complaint, addressing transactions with wholesale gas sellers, which also affected the resolution of several actions related to purchased gas adjustments and an actual cost adjustment. **23 MPSC 3d 188**

§51. Legal expense. Public utility's lawyers did not duplicate each other's efforts, so the Commission awarded the expenses of both lawyers in rate-making. **23MPSC 3d 199**

§57. Purchases under contract. An action filed as a complaint was really a prudence review, in which a showing of serious doubt as to the prudence of an expenditure places the burden of proving the prudence of that expenditure on the utility. **23 MPSC 3d 61**

Renewable Energy Standards statutes provide for renewable energy credits, which certify energy as having come from renewable sources, but not necessarily energy sold to Missouri customers. **23 MPSC 3d 241**

One statute that specifically exempted utilities of a certain description from standards for renewable energy portfolios did not irreconcilably conflict with, and did not impliedly repeal, another statute that generally set forth those standards. **23 MPSC 3d 241**

A statute that specifically exempted utilities from standards for renewable energy portfolios was based on a reasonable and open-ended description, so that statute did not constitute an unconstitutional special law. **23 MPSC 3d 241**

GAS

I. IN GENERAL

- §1. Generally**
- §2. Obligation of the utility**
- §3. Certificate of convenience and necessity**
- §4. Abandonment or discontinuance**
- §5. Liability for damages**
- §6. Transfer, lease and sale**

II. JURISDICTION AND POWERS

- §7. Jurisdiction and powers of the State Commission**
- §8. Jurisdiction and powers of the Federal Commissions**
- §9. Jurisdiction and powers of local authorities**

III. CONSTRUCTION AND EQUIPMENT

- §10. Construction and equipment generally**
- §11. Leakage, shrinkage and waste**
- §12. Location**
- §13. Additions and betterments**
- §14. Extensions**
- §15. Maintenance**
- §16. Safety**

IV. OPERATION

- §17. Operation generally**
- §17.1. Purchased Gas Adjustment (PGA)**
- §17.2. Purchased Gas-incentive mechanism**
- §18. Rates**
- §19. Revenue**
- §20. Return**
- §21. Service**
- §22. Weatherization**
- §23. Valuation**
- §24. Accounting**
- §25. Apportionment**
- §26. Restriction of service**
- §27. Depreciation**
- §28. Discrimination**
- §29. Costs and expenses**
- §30. Reports, records and statements**
- §31. Interstate operation**
- §32. Financing practices**
- §33. Billing practices**
- §34. Accounting Authority orders**
- §35. Safety**

V. JOINT OPERATIONS

- §36. Joint operations generally
- §37. Division of revenue
- §38. Division of expenses
- §39. Contracts
- §40. Transportation
- §41. Pipelines

VI. PARTICULAR KIND OF EXPENSES

- §42. Particular kinds of expenses generally
- §43. Accidents and damages
- §44. Additions and betterments
- §45. Advertising, promotion and publicity
- §46. Appraisal expense
- §47. Auditing and bookkeeping
- §48. Burglary loss
- §49. Casualty losses and expenses
- §50. Capital amortization
- §51. Collection fees
- §52. Construction
- §53. Consolidation expense
- §54. Depreciation
- §55. Deficits under rate schedules
- §56. Donations
- §57. Dues
- §58. Employee's pension and welfare
- §59. Expenses relating to property not owned
- §60. Expenses and losses of subsidiaries or other departments
- §61. Expenses of non-utility business
- §62. Expenses relating to unused property
- §63. Expenses of rate proceedings
- §64. Extensions
- §65. Financing costs and interest
- §66. Franchise and license expense
- §67. Insurance and surety premiums
- §68. Legal expense
- §69. Loss from unprofitable business
- §70. Losses in distribution
- §71. Maintenance and depreciation; repairs and replacements
- §72. Management, administration and financing fees
- §73. Materials and supplies
- §74. Purchases under contract
- §75. Office expense
- §76. Officers' expenses
- §77. Political and lobbying expenditures
- §78. Payments to affiliated interests
- §79. Rentals
- §80. Research

§81.	Salaries and wages
§82.	Savings in operation
§83.	Securities redemption or amortization
§84.	Taxes
§85.	Uncollectible accounts
§86.	Administrative expense
§87.	Engineering and superintendence expense
§88.	Interest expense
§89.	Preliminary and organization expense
§90.	Expenses incurred in acquisition of property
§91.	Demand charges
§92.	Expenses incidental to refunds for overcharges

GAS

§3. Certificate of convenience and necessity. Having found that serving a new customer is necessary and convenient for the public service, the Commission granted a gas company's application for an expanded certificate of convenience and necessity, and ordered the filing of revised tariffs. **23 MPSC 3d 121**

The Commission approved the purchase of one gas company by another, granted a certificate of convenience and necessity to the buyer to serve the former service area of the seller, and approved financing in the amount of \$1.02 billion to pay for the acquisition. **23 MPSC 3d 133**

§17.1. Purchased Gas Adjustment (PGA). When retail gas sellers settled their dispute with a wholesale gas seller, the retail gas sellers sought orders from the Commission related to the retail sellers' purchased gas adjustments and actual cost adjustments for several years. The Commission issued an order stating that the Commission will not disallow the overcharged amounts that the retail gas sellers paid to the wholesale gas seller, that the settlement was prudent, and that amounts refunded to the retail gas sellers would go to retail customers through purchased gas adjustments and be included in actual cost adjustments. **23 MPSC 3d 184**

The Commission approved revisions to a cost allocation manual as agreed by the parties to a complaint, addressing transactions with wholesale gas sellers, which also affected the resolution of several actions related to purchased gas adjustments and an actual cost adjustment. **23 MPSC 3d 188**

§74. Purchases under contract. An action filed as a complaint was really a prudence review, in which a showing of serious doubt as to the prudence of an expenditure places the burden of proving the prudence of that expenditure on the utility. **23 MPSC 3d 61**

MANUFACTURED HOUSING

I. IN GENERAL

- §1. Generally**
- §2. Obligation of the manufacturers and dealers**
- §3. Jurisdiction and powers of Federal authorities**
- §4. Jurisdiction and powers of the State Commission**
- §5. Reports, records and statements**

II. WHEN A PERMIT IS REQUIRED

- §6. When a permit is required generally**
- §7. Operations and construction**

III. GRANT OR REFUSAL OF A PERMIT

- §8. Grant or refusal generally**
- §9. Restrictions or conditions**
- §10. Who may possess**
- §11. Public safety**

IV. OPERATION, TRANSFER, REVOCATION OR CANCELLATION

- §12. Operations under the permit generally**
 - §13. Duration of the permit**
 - §14. Modification and amendment of the permit generally**
 - §15. Transfer, mortgage or lease generally**
 - §16. Revocation, cancellation and forfeiture generally**
 - §17. Acts or omissions justifying revocation or forfeiture**
 - §18. Necessity of action by the Commission**
 - §19. Penalties**
-

MANUFACTURED HOUSING

No headnotes in this volume involved the question of manufactured house.

PUBLIC UTILITIES

I. IN GENERAL

- §1. Generally**

- §2. Nature of
- §3. Functions and powers
- §4. Termination of status
- §5. Obligation of the utility

II. JURISDICTION AND POWERS

- §6. Jurisdiction and powers generally
- §7. Jurisdiction and powers of the State Commission
- §8. Jurisdiction and powers of the Federal Commissions
- §9. Jurisdiction and powers of local authorities

III. FACTORS AFFECTING PUBLIC UTILITY CHARACTER

- §10. Tests in general
- §11. Franchises
- §12. Charters
- §13. Acquisition of public utility property
- §14. Compensation or profit
- §15. Eminent domain
- §16. Property sold or leased to a public utility
- §17. Restrictions on service, extent of use
- §18. Size of business
- §19. Solicitation of business
- §20. Submission to regulation
- §21. Sale of surplus
- §22. Use of streets or public places

IV. PARTICULAR ORGANIZATIONS-PUBLIC UTILITY CHARACTER

- §23. Particular organizations generally
- §24. Municipal plants
- §25. Municipal districts
- §26. Mutual companies; cooperatives
- §27. Corporations
- §28. Foreign corporations or companies
- §29. Unincorporated companies
- §30. State or federally owned or operated utility
- §31. Trustees

PUBLIC UTILITIES

§1. **Generally.** The Commission established the assessment amount for fiscal year 2013. **22 MPSC 3d 167**

§7. **Jurisdiction and powers of the State Commission.** Because Ameren Missouri's application involved a transfer of assets, it is within the Commission's jurisdiction to decide pursuant to Section 393.190, RSMo 2000. **22 MPSC 3d 3**

As directed by statute, the Commission calculated the assessment for all public utilities; and directed the Commission's Budget and Fiscal Services Department to calculate the amount due from each utility, directed the Commission's Director of Administration and Regulatory Policy to deliver a statement of such amount due to each utility, ordered each public utility to pay such amount to the Commission's Budget and Fiscal Services Department, and directed the Commission's Budget and Fiscal Services Department to remit such payment to the Director of Revenue. **22 MPSC 3d 123**

RATES

I. JURISDICTION AND POWERS

- §1. Jurisdiction and powers generally
- §2. Jurisdiction and powers of Federal Commissions
- §3. Jurisdiction and powers of the State Commission
- §4. Jurisdiction and powers of the courts
- §5. Jurisdiction and powers of local authorities
- §6. Limitations on jurisdiction and power
- §7. Obligation of the utility

II. REASONABLENESS-FACTORS AFFECTING REASONABLENESS

- §8. Reasonableness generally
- §9. Right of utility to accept less than a reasonable rate
- §10. Ability to pay
- §11. Breach of contract
- §12. Capitalization and security prices
- §13. Character of the service
- §14. Temporary or emergency
- §15. Classification of customers
- §16. Comparisons
- §17. Competition
- §18. Consolidation or sale
- §19. Contract or franchise rate
- §20. Costs and expenses
- §21. Discrimination, partiality, or unfairness
- §22. Economic conditions
- §23. Efficiency of operation and management
- §24. Exemptions
- §25. Former rates; extent of change
- §26. Future prospects
- §27. Intercompany relations
- §28. Large consumption
- §29. Liability of utility
- §30. Location

- §31. Maintenance of service
- §32. Ownership of facilities
- §33. Losses or profits
- §34. Effects on patronage and use of the service
- §35. Patron's profit from use of service
- §36. Public or industrial use
- §37. Refund and/or reduction
- §38. Reliance on rates by patrons
- §39. Restriction of service
- §40. Revenues
- §41. Return
- §42. Seasonal or irregular use
- §43. Substitute service
- §44. Taxes
- §45. Uniformity
- §46. Value of service
- §47. Value of cost of the property
- §48. Violation of law or orders
- §49. Voluntary rates
- §50. What the traffic will bear
- §51. Wishes of the utility or patrons

III. CONTRACTS AND FRANCHISES

- §52. Contracts and franchises generally
- §53. Validity of rate contract
- §54. Filing and Commission approval
- §55. Changing or terminating-contract rates
- §56. Franchise or public contract rates
- §57. Rates after expiration of franchise
- §58. Effect of filing new rates
- §59. Changes by action of the Commission
- §60. Changes or termination of franchise or public contract rate
- §61. Restoration after change

IV. SCHEDULES, FORMALITIES AND PROCEDURE RELATING TO

- §62. Initiation of rates and rate changes
- §63. Proper rates when existing rates are declared illegal
- §64. Reduction of rates
- §65. Refunds
- §66. Filing of schedules reports and records
- §67. Publication and notice
- §68. Establishment of rate base
- §69. Approval or rejection by the Commission
- §70. Legality pending Commission action
- §71. Suspension
- §72. Effective date
- §73. Period for which effective
- §74. Retroactive rates

- §75. Deviation from schedules
- §76. Form and contents
- §77. Billing methods and practices
- §78. Optional rate schedules
- §79. Test or trial rates

V. KINDS AND FORMS OF RATES AND CHARGES

- §80. Kinds and forms of rates and charges in general
- §81. Surcharges
- §82. Uniformity of structure
- §83. Cost elements involved
- §84. Load, diversity and other factors
- §85. Flat rates and charges
- §86. Mileage charges
- §87. Zone rates
- §88. Transition from flat to meter
- §89. Straight, block or step-generally
- §90. Contract or franchise requirement
- §91. Two-part rate combinations
- §92. Charter, contract, statutory, or franchise restrictions
- §93. Demand charge
- §94. Initial charge
- §95. Meter rental
- §96. Minimum bill or charge
- §97. Maximum charge or rate
- §98. Wholesale rates
- §99. Charge when service not used; discontinuance
- §100. Variable rates based on costs-generally
- §101. Fuel clauses
- §102. Installation, connection and disconnection charges
- §103. Charges to short time users

VI. RATES AND CHARGES OF PARTICULAR UTILITIES

- §104. Electric and power
- §105. Demand, load and related factors
- §106. Special charges; amount and computation
- §107. Kinds and classes of service
- §108. Gas
- §109. Heating
- §110. Telecommunications
- §111. Water
- §112. Sewers
- §113. Joint Municipal Utility Commissions

VII. EMERGENCY AND TEMPORARY RATES

- §114. Emergency and temporary rates generally
- §115. What constitutes an emergency
- §116. Prices
- §117. Burden of proof to show emergencies

VIII. RATE DESIGN, CLASS COST OF SERVICE

- §118. Method of allocating costs
- §119. Rate design, class cost of service for electric utilities
- §120. Rate design, class cost of service for gas utilities
- §121. Rate design, class cost of service for water utilities
- §122. Rate design, class cost of service for sewer utilities
- §123. Rate design, class cost of service for telecommunications utilities
- §124. Rate design, class cost of service for heating utilities

RATES

§6. Accounting. The past failure to record properly an amount collected lawfully did not support denial of the amount in ratemaking. **23 MPSC 3d 199**

§66. Filing of schedules reports and records. Public utility filed one tariff, which included a commodity charge. But the Commission's staff presented a different tariff to the Commission for approval, which did not have a commodity charge. The latter tariff was not lawfully before the Commission, so the public utility did not violate any approved tariff when it collected the commodity charge. **23 MPSC 3d 199**

§101. Fuel clauses. Fuel adjustment clause ("FAC") required electric company to divide revenues between customers and itself 95/5 respectively. That split did not apply to off-system sales of electricity under long-term requirement contracts. Long-term requirement contracts did not describe contract sales of electricity for terms of 15 months and 18 months that the electric company had described in various documents as intermediate term sales. Therefore, those sales were subject to the FAC and the electric company acted imprudently in treating them outside the FAC. **23 MPSC 3d 137**

§102. Installation, connection and disconnection charges. The Commission required a refund of over-collected late charges and re-connection charges, but did not require payment of interest because no applicable law provided for the payment of interest. **23 MPSC 3d 199**

§104. Electric and power. Fuel adjustment clause ("FAC") required electric company to divide revenues between customers and itself 95/5 respectively. That split did not apply to off-system sales of electricity under long-term requirement contracts. Long-term requirement contracts did not describe contract sales of electricity for terms of 15 months and 18 months that the electric company had described in various documents as intermediate term sales. Therefore, those sales were subject to the FAC and the electric company acted imprudently in treating them outside the FAC. **23 MPSC 3d 137**

SECURITY ISSUES

I. IN GENERAL

- §1. Generally
- §2. Obligation of the utility
- §3. Authorization by a corporation
- §4. Conversion, redemption and purchase by a corporation
- §5. Decrease of capitalization
- §6. Sinking funds
- §7. Dividends
- §8. Revocation and suspension of Commission authorization
- §9. Fees and expenses
- §10. Purchase by utility
- §11. Accounting practices

II. JURISDICTION AND POWERS

- §12. Jurisdiction and powers in general
- §13. Jurisdiction and powers of Federal Commissions
- §14. Jurisdiction and powers of the State Commission
- §15. Jurisdiction and powers of local authorities

III. NECESSITY OF AUTHORIZATION BY THE COMMISSION

- §16. Necessity of authorization by the Commission generally
- §17. Installment contracts
- §18. Refunding or exchange of securities
- §19. Securities covering utility and nonutility property
- §20. Securities covering properties outside the State

IV. FACTORS AFFECTING AUTHORIZATION

- §21. Factors affecting authorization generally
- §21.1. Effect on bond rating
- §22. Equity capital
- §23. Charters
- §24. Competition
- §25. Compliance with the terms of a mortgage or lease
- §26. Definite plans and purposes
- §27. Financial conditions and prospects
- §28. Use of proceeds
- §29. Dividends and dividend restrictions
- §30. Improper practices and irregularities
- §31. Intercompany relations
- §32. Necessity of issuance
- §33. Revenue
- §34. Rates and rate base
- §35. Size of the company
- §36. Title of property
- §37. Amount

- §38. Kind of security
- §39. Restrictions imposed by the security

V. PURPOSES AND SUBJECTS OF CAPITALIZATION

- §40. Purposes and subjects of capitalization generally
- §41. Additions and betterments
- §42. Appreciation or full plant value
- §43. Compensation for services and stockholders' contributions
- §44. Deficits and losses
- §45. Depreciation funds and requirements
- §46. Financing costs
- §47. Intangible property
- §48. Going value and good will
- §49. Stock dividends
- §50. Loans to affiliated interests
- §51. Overhead
- §52. Profits
- §53. Refunding, exchange and conversion
- §54. Reimbursement of treasury
- §55. Renewals, replacements and reconstruction
- §56. Working capital

VI. KINDS AND PROPORTIONS

- §57. Bonds or stock
- §58. Common or preferred stock
- §59. Stock without par value
- §60. Short term notes
- §61. Proportions of stock, bonds and other security
- §62. Proportion of debt to net plant

VII. SALE PRICE AND INTEREST RATES

- §63. Sale price and interest rates generally
- §64. Bonds
- §65. Notes
- §66. Stock
- §67. Preferred stock
- §68. No par value stock

VIII. FINANCING METHODS AND PRACTICES

- §69. Financing methods and practices generally
- §70. Leases
- §71. Financing expense
- §72. Payment for securities
- §73. Prospectuses and advertising
- §74. Subscriptions and allotments
- §75. Stipulation as to rate base

IX. PARTICULAR UTILITIES

- §76. Telecommunications**
 - §77. Electric and power**
 - §78. Gas**
 - §79. Sewer**
 - §80. Water**
 - §81. Miscellaneous**
-

SECURITY ISSUES

§61. Proportions of stock, bonds and other security. The Commission approved one capital structure for one corporation providing two services and rejected the proposed alternative of two capital structures, one for each of the two services. **23 MPSC 3d 199**

SERVICE

I. IN GENERAL

- §1. Generally**
- §2. What constitutes adequate service**
- §3. Obligation of the utility**
- §4. Abandonment, discontinuance and refusal of service**
- §5. Contract, charter, franchise and ordinance provisions**
- §6. Restoration or continuation of service**
- §7. Substitution of service**
- §7.1. Change of supplier**
- §8. Discrimination**

II. JURISDICTION AND POWERS

- §9. Jurisdiction and powers generally**
- §10. Jurisdiction and powers of the Federal Commissions**
- §11. Jurisdiction and powers of the State Commission**
- §12. Jurisdiction and powers over service outside of the state**
- §13. Jurisdiction and powers of the courts**
- §14. Jurisdiction and powers of local authorities**
- §15. Limitations on jurisdiction**
- §16. Enforcement of duty to serve**

III. DUTY TO SERVE

- §17. Duty to serve in general**
- §18. Duty to render adequate service**
- §19. Extent of profession of service**
- §20. Duty to serve as affected by contract**

- §21. Duty to serve as affected by charter, franchise or ordinance
- §22. Duty to serve persons who are not patrons
- §23. Reasons for failure or refusal to serve
- §24. Duty to serve as affected by inadequate revenue

IV. OPERATIONS

- §25. Operations generally
- §26. Extensions
- §27. Trial or experimental operation
- §28. Consent of local authorities
- §29. Service area
- §30. Rate of return
- §31. Rules and regulations
- §32. Use and ownership of property
- §33. Hours of service
- §34. Restriction on service
- §35. Management and operation
- §36. Maintenance
- §37. Equipment
- §38. Standard service
- §39. Noncontinuous service

V. SERVICE BY PARTICULAR UTILITIES

- §40. Gas
- §41. Electric and power
- §42. Heating
- §43. Water
- §44. Sewer
- §45. Telecommunications

VI. CONNECTIONS, INSTRUMENTS AND EQUIPMENT

- §46. Connections, instruments and equipment in general
- §47. Duty to install, own and maintain
- §48. Protection, location and liability for damage
- §49. Restriction and control of connections, instruments and equipment

SERVICE

No headnotes in this volume involved the question of service.

SEWER

I. IN GENERAL

- §1. Generally
- §2. Certificate of convenience and necessity
- §3. Obligation of the utility
- §4. Transfer, lease and sale

II. JURISDICTION AND POWERS

- §5. Jurisdiction and powers generally
- §6. Jurisdiction and powers of the Federal Commissions
- §7. Jurisdiction and powers of the State Commission
- §8. Jurisdiction and powers of local authorities
- §9. Territorial agreements

III. OPERATIONS

- §10. Operation generally
- §11. Construction and equipment
- §12. Maintenance
- §13. Additions and betterments
- §14. Rates and revenues
- §15. Return
- §16. Costs and expenses
- §17. Service
- §18. Depreciation
- §19. Discrimination
- §20. Apportionment
- §21. Accounting
- §22. Valuation
- §23. Extensions
- §24. Abandonment or discontinuance
- §25. Reports, records and statements
- §26. Financing practices
- §27. Security issues
- §28. Rules and regulations
- §29. Billing practices
- §30. Eminent domain
- §31. Accounting Authority orders

SEWER

§2. Certificate of convenience and necessity. The Commission granted the application of a sewer company for a certificate of convenience and necessity to provide service to a new subdivision, conditioned on acquiring access to the property on which a wastewater treatment facility was located. **23 MPSC 3d 233**

§4. Transfer, lease and sale. Conditions on which the Commission approved the merger of sewer companies included standards for reporting depreciation and payment of the acquired company's debt, recordkeeping standards, and training of service representatives. **23 MPSC 3d 58**

§21. Accounting. Conditions on which the Commission approved the merger of sewer companies included standards for reporting depreciation and payment of the acquired company's debt, recordkeeping standards, and training of service representatives. **23 MPSC 3d 58**

§24. Abandonment or discontinuance

On a finding that owners of sewer companies had abandoned their sewer systems, the Commission granted Staff's petition to appoint an interim receiver, and file an action in circuit court for appointment of a receiver, for two sewer companies. **23 MPSC 3d 197**

§25. Reports, records and statements. Conditions on which the Commission approved the merger of sewer companies included standards for reporting depreciation and payment of the acquired company's debt, recordkeeping standards, and training of service representatives. **23 MPSC 3d 58**

§29. Billing practices

Conditions on which the Commission approved the merger of sewer companies included standards for reporting depreciation and payment of the acquired company's debt, recordkeeping standards, and training of service representatives. **23 MPSC 3d 58**

STEAM

I. IN GENERAL

- §1. Generally**
- §2. Obligation of the utility**
- §3. Certificate of convenience and necessity**
- §4. Transfer, lease and sale**
- §4.1. Change of suppliers**
- §5. Charters and franchise**
- §6. Territorial agreements**

II. JURISDICTION AND POWERS

- §7. Jurisdiction and powers generally**
- §8. Jurisdiction and powers of Federal Commissions**
- §9. Jurisdiction and powers of the State Commission**
- §10. Jurisdiction and powers of the local authorities**
- §11. Territorial agreements**
- §12. Unregulated service agreements**

III. OPERATIONS

- §13. Operations generally
- §14. Rules and regulations
- §15. Cooperatives
- §16. Public corporations
- §17. Abandonment and discontinuance
- §18. Depreciation
- §19. Discrimination
- §20. Rates
- §21. Refunds
- §22. Revenue
- §23. Return
- §24. Services generally
- §25. Competition
- §26. Valuation
- §27. Accounting
- §28. Apportionment
- §29. Rate of return
- §30. Construction
- §31. Equipment
- §32. Safety
- §33. Maintenance
- §34. Additions and betterments
- §35. Extensions
- §36. Local service
- §37. Liability for damage
- §38. Financing practices
- §39. Costs and expenses
- §40. Reports, records and statements
- §41. Billing practices
- §42. Planning and management
- §43. Accounting Authority orders
- §44. Safety
- §45. Decommissioning costs

IV. RELATIONS BETWEEN CONNECTING COMPANIES

- §46. Relations between connecting companies generally
- §47. Physical connection
- §48. Contracts
- §49. Records and statements

STEAM

No headnotes in this volume involved the question of steam.

TELECOMMUNICATIONS

I. IN GENERAL

- §1. Generally
- §2. Obligation of the utility
- §3. Certificate of convenience and necessity
- §3.1. Certificate of local exchange service authority
- §3.2. Certificate of interexchange service authority
- §3.3. Certificate of basic local exchange service authority
- §4. Transfer, lease and sale

II. JURISDICTION AND POWERS

- §5. Jurisdiction and powers of local authorities
- §6. Jurisdiction and powers of Federal Commissions
- §7. Jurisdiction and powers of the State Commission

III. OPERATIONS

- §8. Operations generally
- §9. Public corporations
- §10. Abandonment or discontinuance
- §11. Depreciation
- §12. Discrimination
- §13. Costs and expenses
- §13.1. Yellow Pages
- §14. Rates
- §14.1 Universal Service Fund
- §15. Establishment of a rate base
- §16. Revenue
- §17. Valuation
- §18. Accounting
- §19. Financing practices
- §20. Return
- §21. Construction
- §22. Maintenance
- §23. Rules and regulations
- §24. Equipment
- §25. Additions and betterments
- §26. Service generally
- §27. Invasion of adjacent service area
- §28. Extensions
- §29. Local service
- §30. Calling scope
- §31. Long distance service
- §32. Reports, records and statements
- §33. Billing practices
- §34. Pricing policies
- §35. Accounting Authority orders

IV. RELATIONS BETWEEN CONNECTING COMPANIES

- §36. Relations between connecting companies generally
- §37. Physical connection
- §38. Contracts
- §39. Division of revenue, expenses, etc.

V. ALTERNATIVE REGULATION AND COMPETITION

- §40. Classification of company or service as noncompetitive, transitionally , or competitive
- §41. Incentive regulation plans
- §42. Rate bands
- §43. Waiver of statutes and rules
- §44. Network modernization
- §45. Local exchange competition
- §46. Interconnection Agreements
- §46.1 Interconnection Agreements-Arbitrated
- §47. Price Cap

TELECOMMUNICATIONS

§7. Jurisdiction and powers of the State Commission. A complaint charged a local exchange telecommunications company with setting unlawful payphone rates, but a statutory amendment eliminated the Commission's authority to regulate prices between a local exchange telecommunications company and payphone providers, so the Commission dismissed the complaint. **23 MPSC 3d 113**

The Commission has no authority to order refunds from a local exchange telecommunications company to payphone providers. **23 MPSC 3d 113**

§14.1 Universal Service Fund. Statutes provide contributions to the Universal Service Fund through an assessment levied on telecommunications companies. Filings showed that a reduced assessment would "ensure just, reasonable, and affordable rates for reasonably comparable essential local telecommunications services throughout the state." Therefore, the Commission reduced assessments for telecommunications companies. **23 MPSC 3d 77**

§24. Procedures, evidence and proof. The Commission may approve a tariff without convening a contested case. **23 MPSC 3d 113**

Other than in a decision in a contested case, the Commission need not separately state its findings of fact. **23 MPSC 3d 113**

§27. Finality and conclusiveness. The Commission's decision is subject to judicial review, but not collateral attack. **23 MPSC 3d 113**

§27. Invasion of adjacent service area. On allegation of misleading regulatory authorities and advertising outside service territory, a revised stipulation and agreement addressed the Commission's concerns and was consistent with the public interest, so the Commission approved it.

23 MPSC 3d 1

§46. Interconnection Agreements. Interconnection agreement between telecommunications companies provided that one company owed access charges to another when delivering interconnected voice over internet protocol ("I-VOIP") traffic. I-VOIP traffic is characterized by a broadband connection, which means anything faster than dial-up. Complainant showed that the traffic at issue was within that description, so it carried its burden of proving that access charges were due on that service. **23 MPSC 3d 79**

VALUATION

I. IN GENERAL

- §1. Generally**
- §2. Constitutional limitations**
- §3. Necessity for**
- §4. Obligation of the utility**

II. JURISDICTION AND POWERS

- §5. Jurisdiction and powers generally**
- §6. Jurisdiction and powers of the State Commission**
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VALUATION

§24. Test year and true up. In determining the amount of an expense to include in rate-making, the Commission rejected evidence of an amount outside the test year. **23 MPSC 3d 199**

§39. Legal expense. Public utility's lawyers did not duplicate each other's efforts, so the Commission awarded the expenses of both lawyers in rate-making. **23 MPSC 3d 199**

§77. Adjustments to test year levels. . In determining the amount of an expense to include in rate-making, the Commission rejected evidence of an amount outside the test year. **23 MPSC 3d 199**

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WATER

§2. Certificate of convenience and necessity. Sale of a water company served the public interest, because seller had neglected its duties, and buyer had experience in running a water company. **23 MPSC 3d 92**

When the parties to an application for certificates of convenience and necessity to operate a water and sewer company settled their issues, and showed that the application qualified for certificates of convenience and necessity, the Commission granted the application, which resolved a complaint that the applicant had been operating without a certificate of convenience and necessity. **23 MPSC 3d 119**

The Commission approved the acquisition of one water company by another, issued a certificate of convenience and necessity to the buyer for service in the seller's former territory, and waived the pre-application notice. **23 MPSC 3d 192**

§4. Transfer, lease and sale. Sale of a water company served the public interest, because seller had neglected its duties, and buyer had experience in running a water company. **23 MPSC 3d 92**

In the sale of a water company, the Commission barred any acquisition premium from future rates, but did not bar any acquisition adjustment. **23 MPSC 3d 92**

Neither seller nor buyer owned the wells that supplied water to company being sold, so the Commission conditioned approval of the sale on buyer's acquisition of wells and the issuance of a certificate of convenience and necessity to the buyer. **23 MPSC 3d 92**

§13. Construction and equipment. Conditions on which the Commission approved the merger of water companies included standards for reporting depreciation, recordkeeping standards, and inspection and replacement of meters. **23 MPSC 3d 74**

§18. Costs and expenses. A petition to initiate rulemaking asked the Commission to create an environmental cost adjustment mechanism for water companies, but the Commission had insufficient information to address the statutory standards for making a rule without further research, so the Commission denied the petition but began an investigation on the issues that such a rulemaking must address. **23 MPSC 3d 4**

§20. Depreciation. Conditions on which the Commission approved the merger of water companies included standards for reporting depreciation, recordkeeping standards, and inspection and replacement of meters. **23 MPSC 3d 74**

§27. Reports, records and statements. Conditions on which the Commission approved the merger of water companies included standards for reporting depreciation, recordkeeping standards, and inspection and replacement of meters. **23 MPSC 3d 74**

§30. Rules and regulations. A petition to initiate rulemaking asked the Commission to create an environmental cost adjustment mechanism for water companies, but the Commission had insufficient information to address the statutory standards for making a rule without further research, so the Commission denied the petition but began an investigation on the issues that such a rulemaking must address. **23 MPSC 3d 4**